Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Gerald Theodore, Michaud - Petitioner

VS.

CHIEF JUDGE HUG; SCHROEDER, KOZINSKI, FARRIS, BRUNETTI and SILVERMAN CIRCUIT JUDGES - RESPONDENT(S)

and

UNITED STATES MAGISTRATE JUDGE FRANCIS I. YAMASHITA & UNITED STATES DISTRICT JUDGE SAMUEL P. KING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, AND U.S. SOLICITOR GENERAL et al,

Real Parties in Interest.

ON INFORMAL PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gerald Theodore, Michaud
In Proper Person
P.O. Box 10236
Lahaina, Hawaii 96761
(808) 665-1077

35PP

QUESTIONS PRESENTED

1. Were Petitioner's right to a jury trial abandoned when the United States Court of Appeals for the Ninth Circuit ("Ninth") arbitrarily dismissed case.
2. Were Petitioner's right to contract impaired when the Ninth regulated Petitioner's remedy for its enforcement.
3. Were the rights of Petitioner violated by the Ninth, when those presiding justices departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower courts, a court whose duty it is to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon, Boyd v. U.S., 116 US 635, when they failed to issue the Writ of Error ("Writ") supported by oath and asseverations.
4. Were the due process rights of Petitioner violated when the Ninth summarily and arbitrarily denied the Writ without, as a minimum, a hearing, when a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias, In Re Murchison et al, 349 US 133, 136 (1955), when the pleadings contain positive proof, by sworn affidavit, that the allegations in the Writ are valid.
5. Were the equal protection rights of Petitioner violated when the Ninth became immune by judicial edict from obeying the mandates of the Constitution when the citizens themselves are held to the mandates of the Constitution.
6. Has the right of Petitioner to a republican form of government been denied by the Ninth, who protected and clothed the lower courts with

the power to annul or evade the state and federal constitutions, by the denial of the Writ in the face of overwhelming evidence.

7. Were the Privilege and Immunity rights of Petitioner violated by the summary denial of the Writ without affording Petitioner opportunity for a hearing and/or the issuance of a Writ when the evidence is beyond any reasonable doubt.
8. Were the property rights (to submit an action and have a remedy) of Petitioner violated by the arbitrary summary denial of Writ when it is Petitioner's chose in action right. Gregory v. Colvin, 235 Ark. 1007, 363 S.W.2d 539, 540.
9. Were the rights of Petitioner violated by the arbitrary and summary denial of the Writ because the Ninth failed to compel the lower courts to perform in accordance with a constitutional provision, a plain and palpable violation of the constitution.
10. Were the rights of Petitioner violated when the lower court arbitrarily taxed Petitioner's right to a jury trial.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

SUPREME COURT JUSTICES' RONALD MOON; ROBERT KLIEN; PAULA NAKAYAMA; STEVEN LEVINSON; MARIO RAMIL OF THE SUPREME COURT OF THE STATE OF HAWAII, AND CIRCUIT COURT JUDGES E. JOHN McCONNELL & BOYD P. MOSSMAN OF THE CIRCUIT COURT OF SECOND CIRCUIT STATE OF HAWAII; ATTORNEYS McCORRISTON, MIHO, MILLER, AND MUKAI ON BEHALF OF STATE FARM INSURANCE COMPANIES; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; ATTORNEYS TAM O'CONNOR & HENDERSON ON BEHALF OF KIHEI RENT A CAR COMPANY AND CRAWFORD & COMPANY; INSURANCE COMMISSIONER WAYNE METCALF, STATE OF HAWAII INSURANCE DIVISION; HAWAI'I ATTORNEY GENERAL MARGERY BRONSTER; UNITED STATES ATTORNEY STEVEN ALM FOR THE DISTRICT OF HAWAII, AND FEDERAL BUREAU OF INVESTIGATION AGENT HAROLD MARSHAL FOR THE DISTRICT OF HAWAII,

Real Parties in Interest.

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MAXIMS OF LAW

"The law wills that, in every case where a man is wronged and endamaged, he shall always have a remedy." Coke on Littleton 197b; Branch's Principia Legis et Equitatis; Broom's Legal Maxims 192, John Bouvier's Institutes of American Law 2411 .. 24

"It is just that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character." American Maxim 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was NOVEMBER 20, 1998, and appears at Appendix "D".

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER 4, 1998, and a copy of the order denying rehearing appears at Appendix "C".

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1, of the United States Constitution States:

> "The Citizens of each state shall be entitled to all privileges and immunities of Citizens in the several states."

Article IV, Section 4, of the United States Constitution states:

> "The United States shall guarantee to every state in this union a Republican Form of Government,..."

Fifth Amendment to the Constitution reads, in part, as follows:

> "...nor be deprived of life liberty, or property, without due process of law;..."

Seventh Amendment to the Constitution reads, in part, as follows:

> "In suits at common law...the right of trial by jury shall be preserved..."

Article I Section 10 (1) to the Constitution reads, in part, as follows:

> "No State shall pass...any...law impairing the obligation of contracts..."

Hawaii State Constitution Article I Section 5 reads, in part, as follows:

> "No person shall be deprived of life liberty, or property, without due process of law; nor be denied the equal protection of the laws..."

Hawaii State Constitution Article I Section 13 reads, in part, as follows:

> "In suits at common law...the right of trial by jury shall be preserved..."

Hawaii Revised Statutes § 1-1 reads, in part, as follows:

> "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases..."

Hawaii Revised Statutes § 490:1-103 reads, in part, as follows:

> "Supplementary general principles of law applicable..."

Hawaii Revised Statutes § 602 - 4 reads, in part, as follows:

> "The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

Hawaii Revised Statutes § 602 - 5(4)(6) reads, in part, as follows:

> "The supreme court shall have jurisdiction and powers as follows:
>
> (4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction..."
> (6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court..."

CASES SUPPORTING JURISDICTION

Haines v. Kerner, 404 U.S. 519, 520;

Clough vs. Lewis, 134 U.S. 361, 371;

Bacon v. Texas, 163 U.S. 207,

Sugar Refining Co., 125 U.S. 18

STATEMENT OF THE CASE

This case arises from an original action in the nature of a Writ of Error ("Writ") filed with the United States Court of Appeals for the Ninth Circuit ("Ninth"), which was denied summarily, barring Petitioner's due process rights by not addressing the material points of fact and law as overlooked in its decision, making it apparent that it is in conflict with other decisions of the court which were not addressed in the opinion, and thereby substantially affected a rule of national application in which there is an overriding need for national uniformity. Petitioner received from the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, Notice of Entry of Judgment (that conflicts with FRCP 41 (a) (2); Appendix D), Petition for Rehearing with Suggestion for Rehearing En Banc (FRAP 35, CIRCUIT RULE 35), Grounds for suggesting En Banc Consideration:

> "Parties should seek en banc consideration only if one or more of the following grounds exists: (3) when the opinion...substantially affects a rule of national application in which there is an overriding need for national uniformity."

On or about April 29, 1994, while Petitioner was abiding in the county of Maui, State of Hawaii, engaged in the act of traveling in his automobile, around or near Kihei, Maui, Hawaii, Petitioner experienced the bad fortune of being hit head-on by an automobile owned by one Kihei Rent a Car Company, whose automobile caused serious damage to Petitioner's physical body and personal property.

Hawaii is a no-fault insurance state, governed by Hawaii Revised Statutes ("HRS"). HRS provides restitution of all physical damages which exceed a fixed threshold figure. HRS §§ 431:10C-306 and 308. Petitioner's damages qualified immediately.

HRS §§ 1-1 & 490:1-103 also guarantees the right to common law jurisdiction, of which Petitioner timely reserved explicitly.

It is just that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character.

State Farm Mutual Automobile Insurance Company ("State Farm"), was Petitioner's insurance carrier for approximately eight years up to the April 29, 1994 incident, and is still insuring Petitioner today. State Farm handled two separate contractual policies for Petitioner. Insurance contracts include the State of Hawaii Insurance Division. State Farm refused to settle Petitioner's claims, alleging Petitioner's policy was cancelled. Petitioner's cross allegation was that a policy can not be cancelled without first complying with the HRS mandates governing cancellations.

October 31, 1994, Petitioner filed with the State of Hawaii Insurance Division a Complaint against State Farm along with a Petition for a Declaratory Ruling. The issues raised for Declaratory Ruling were regularly circumvented by the Hawaii Insurance Division, this prompted Petitioner to contact the State of Hawaii Ombudsman for help in resolving the instant matter. The Ombudsman initiated an immediate response from the Hawaii Insurance Division who merely replied by wresting Petitioner's issues causing the Ombudsman to summarily abandon the matter.

On or about November 7, 1995, Petitioner, in propria persona Haines v. Kerner, 404 U.S. 519, 520, filed a Complaint in the proper venue and jurisdiction of the Circuit Court of the Second Circuit for the State of Hawaii ("HCC"), which included a Demand for a Jury Trial, firmly incorporating the federal question into this instant matter against State

Farm, et al, Civil Number 95-0844 (1), for not honoring its no-fault insurance contract with Petitioner.

State Farm, on February 15, 1996, under color of law, removed Complaint over Petitioner's objections to the United States District Court for the District of Hawaii, claiming diversity of citizenship while the issues at bar concern the State of Hawaii, making it, et al, parties to the suit.

> "As a general rule, if plaintiff has a remedy under both state and federal law, it may base its claim solely on state law and thus defeat defendant's potential right to removal, if diversity of citizenship is lacking...Removability is to be determined from the face of the complaint at the time of removal." Coditron Corp. v. AFA Protective Systems, Inc., 392 F. Supp. 158 (1975), 28 U.S.C.A. § 1447 (c).

Numerous federal questions, had been thoroughly presented in Petitioner's September 9, 1996, eighteen (18) page Memorandum in response to findings and recommendation filed in the United States District Court for the District of Hawaii on September 3, 1996. The United States Court of Appeals for the Ninth Circuit, on or about March 6, 1997, received the aforementioned federal questions under the title of, "Appellant's or Petitioner's Informal Brief" (originally filed as a writ of error, arbitrarily changed by the Ninth), same was not filed until five months following on July 11, 1997. The timely raised federal questions (including over thirty four cases) were overlooked, and remain unsettled.

> "The doctrine of stare decisis, commonly called the 'doctrine of precedents,' means that we should adhere to decided cases and settled principles and not disturb matters which have been established by judicial determination." Johnson v. Western Union Tele. Co., (N.C.) 57 S.E. 122, 124.

March 13, 1996, Petitioner filed in the Hawaii Supreme Court an Appeal, Number 19717. May 29, 1996, in the interest of brevity, the Appeal was summarily denied by Order without hearing.

January 31, 1996, Petitioner filed a Complaint with the State of Hawaii Ombudsman's office against the State of Hawaii Insurance Division, of which both departments of government summarily avoided Petitioner's particular issues so critical to State Farm.

Petitioner, on April 24, 1996, filed a complaint in the HCC against Kihei Rent A Car Company, and Crawford & Company, et al, ("Kihei"), Civil Number 96-0344 (3), for breach of good faith and fair dealing with regard to damages Petitioner sustained due to Kihei's automobile, said complaint included a Demand for a Jury Trial, firmly incorporating the federal question in this matter also.

Kihei's action was summarily dismissed on October 17, 1996. Petitioner filed on October 31, 1996, in the Hawaii Supreme Court, Number 20404, a Notice for Supervisory Jurisdiction, in the Nature of a Writ of Error. It to summarily dismissed without hearing on May 13, 1998.

On May 18, 1998, Petitioner filed in the United States District Court for the District of Hawaii, number CV98 00395 SPK an Informal Notice of Petition in the Nature of a Writ of Error Now Termed Appeal. Petition summarily dismissed without hearing on September 8, 1998.

Since it appeared that the actions of those responsible for protecting Petitioner's rights were also in violation of United States Criminal Codes, Petitioner furnished the US Attorney a Witnessed Affidavit of Probable Cause and Complaint dated May 9, 1998 ("Fed. Complaint"), Certified Mail # P 398 097 783. Petitioner did not receive a response from US Attorney until July 21, 1998 (nearly three months later), acknowledging the Fed. Complaint, who stated that it had been forwarded to the FBI for review

of any federal violations. Extraordinary conditions may call for extraordinary remedies. Schechter v. United States, 295 U.S. 495, 528.

On July 22, 1998, Petitioner received a telephone call from FBI Agent Hal Marshal of which Petitioner responded by filing a telephone confirmation letter. On two separate occasions (September 2, 1998 and October 2, 1998) Petitioner requested from the US Attorney and the FBI (carbon copy US Justice) a request for disposition. Petitioner has received no reply to this date.

Petitioner, on October 14, 1998, filed in the Ninth an "Informal Petition for Review & Consolidation" of Kihei with State Farm. Petition summarily denied without hearing on November 13, 1998.

The necessity for a writ arose as a result of Petitioner's observation that the State of Hawaii Insurance Division ("HID"), the State of Hawaii Ombudsman ("Ombudsman"), the Hawaii Circuit Court for the Second Circuit ("HCC"), the Hawaii Supreme Court ("HSC"), the United States District Court for the District of Hawaii ("HFDC"), the Attorney General for the State of Hawaii ("HAG"), the United States Attorney for the State of Hawaii ("US Attorney"), the Federal Bureau of Investigation for the State of Hawaii ("FBI"), the United States Department of Justice, Washington, D.C. ("US Justice"), and the Ninth are not complying with the federal and/or state Constitutions.

Precision and certainty are often of more importance to the rules of law than their abstract justice. 9 Wheat (22 U.S.) 598, 602.

FEDERAL QUESTION TIMELY AND PROPERLY RAISED

The aforesaid federal questions were timely and properly raised and yet there are continual violations of the Constitutional provisions in that:

1. It would appear on record that the federal and state agencies have prejudiced Petitioner by not noticing any of the issues as presented by Petitioner regarding the April 29, 1994 cause of action supra. Nor has any of the aforesaid departments of government acknowledged;

2. Proper jurisdiction concerning Petitioner's proper person:

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear or unquestionable authority of law." Union Pac. Ry. V. Botsford, 141 U.S. 250, 251.

3. The federal questions were timely noticed in the State Farm Demand for Jury trial, and again in the HFDC September 9, 1996 Memorandum ibid., overlooked by the HCC, HSC, HAG, HFDC, and Ninth.

4. The federal question with regard to Kihei was noticed in the April 24, 1996 Complaint, and demand for Jury trial, ibid., raised again in Petitioner's July 16, 1996 HCC Memorandum pages 2 and 4 declaring that, "the issues are to be decided by a jury", and again on July 25, 1996, in Petitioner's HCC Memorandum at page 3 Demanding a jury trial, which was overlooked by the HCC, HSC, HAG, HFDC, and Ninth.

ARGUMENT

ADMINISTRATIVE REMEDIES

Having observed these errors in irregular proceedings (including alterations to Petitioner's filings) where the Ninth arbitrarily dishonored Petitioner's pleadings to correct the record, Petitioner took administrative steps to resolve the problem. Petitioner prepared personal letters that included an affidavit of probable cause in hopes that the proper agencies and/or departments of government ibid., would resolve the situation at hand.

Even though the matter has been brought to their attention, neither proper procedure nor fixed decisions have been addressed and/or corrected as of this date.

The Hawai'i Attorney General has not filed an explanation for these constitutional violations nor an adequate remedy.

The October 31, 1994, Complaint in the HID against State Farm, inevitably including Kihei, ended due to stalling about June 11, 1996.

WRIT OF ERROR

Since the HCC, HSC, and HFDC have never been issued an order to show cause, Petitioner submitted to the Ninth, November 20, 1996, a Notice of a Termed Appeal for Supervisory Control in the nature of a Writ of Error ("Writ").

Departing from Rule 21 of the FRAP, and Ninth Circuit Rule 21, the Ninth arbitrarily modeled the Petitioner into a Respondent, and ordered same to file extra pleadings, affidavits, and asseverations attesting to off point issues, all of which is contrary to Rule 21 FRAP, and Circuit Rule 21. Petitioner submitted overwhelming evidence to the Ninth which requires the Writ to issue. The Ninth never established whether or not the Writ was abolished by statute, thereby securing same to Petitioner as a Writ of right. Winchester v. Winn, 225 Mo. App. 288, 29 S.W.2d 188, 190.

The Ninth failed to issue the Writ, knowing full well that a Writ is appropriate for Petitioner's common law action, and proper when the lower courts fail to perform in conformance with the federal and state

Constitutions. Petitioner clearly exhausted all other remedies, and supported the Writ by proper asseverations, therefore, the Writ should have issued. However, twice, said Writ has been arbitrarily and summarily denied by the Ninth without a hearing.

REASONS FOR GRANTING THE PETITION

SUBSTANTIALITY OF FEDERAL QUESTION

This Writ presents an important and substantial question of the first impression, as hereinafter described, in that the issue it presents is the constitutionality of denying the Petitioner, who is a unique component of the people of the state, the ability to bring an action against the federal/state administrative agencies of government, and/or honorable justices when they do not perform in accordance with the constitution, and denies not only the Petitioner, but also the body of people that make up the state, for if they deny one they deny all due process of law, in that no hearing was set, which denies Petitioner and respectively the people their day in court.

Petitioner was only afforded a one sided hearing in order to eliminate Petitioner's significant federal questions, and, as the result of eliminating the Writ, and the fact that Petitioner has exhausted all other remedies, the United States Supreme Court has become the first and only court to which Petitioner can appeal.

Petitioner maintains that there can be no violation of the law without a remedy, and all actions are appealable to at least one higher

judicial body which is mandated to hear the issue, except when the United States Supreme Court exercises its original jurisdiction.

> "Remedies are the life of rights." Campbell v. Holt, 115 U.S. 620, 631. "Remedy signifies the judicial means for enforcing a right or redressing a wrong." Walters v. City of Ottawa, 88 N.E. 651, 654, 240 Ill. 259.

THE WRIT OF MANDATE

In order for a writ to issue, it need only be shown that:

1. A duty is imposed --- Mandamus does not lie to compel discretionary acts. Brashear v. Mason, 6 How 92. However, in this case, the duty in question is not discretionary but constitutionally mandated and Petitioner established that a duty exists in the basic pleading.
2. Petitioner has the right to demand performance --- Any citizen has a natural right to expect his government to obey the law; therefore any citizen who observes the disobedience of the law has a right to demand performance.

Petitioner recognizes that a Writ of Mandate cannot generally be demanded as a matter of right, and is awardable at the discretion of the court. However, where a clear legal right to a writ is shown, the court has no discretion about granting it. Illinois Central R. Co. v. People, 143 Ill 343, 33 N.E. 173.

Would it not follow that a citizen has the right to a writ of mandate to compel public ministers to perform statutory duties, even though the details of such performance are left to the discretion of the court?

3. Petitioner has made the demand for a jury trial in the State Farm and Kihei actions upon original filings, for which the HCC has unconstitutionally taxed Petitioner to insure this right. This alone would raise another federal question.

> "Due process of law as a guarantee of trial by jury in the judicial branch of government---The words "law of the land" or "due process of law," when used in considering the property rights of individuals, means summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading facts in issue, and a determination thereof by a jury." State v. Rose, 33 Del. 168, 132, A 865, 45 ALA 85

Because Petitioner has not been accorded a jury trial:

> "Party may seek relief in form of mandamus to protect right to jury trial." (1991) U.S.C.A. Const. Amend. 7. –Wilmington Trust v. U.S. Dist. Court for Dist. Of Hawaii, 934 F. 2d 1026, certiorari denied Connecticut Bank and Trust Co. v. Wilmington Trust Co., 112 S.Ct. 1578, 503 U.S. 966, 118 L.Ed.2d 220.

4. The lower courts have the ability to comply, and there can be no doubt that Respondents have the capacity to perform as the law demands.

> "Where trial court has discretion to act, mandamus will not lie to interfere with or control exercise of discretion, even when judge has acted erroneously, unless judge has exceeded his or her jurisdiction, has committed flagrant and manifest abuse of discretion, or has refused to act on subject properly before court on which judge is subject to legal duty to act. (1996) State ex rel. Kaneshiro v. Huddy, 921 P.2d 108, 82 Hawai'i 188, reconsideration denied 922 P.2d 973, 82 Hawai'i 360.

5. There is no other plain, speedy, and adequate remedy. Petitioner has appealed to all persons concerned only to be ignored.

Clearly a Mandamus lies to compel performance of a statutory duty when it is clear and indisputable and there is no other legal remedy. Baynard v. U.S., 127 U.S. 24, If a mandamus lies to compel a mere statutory duty, a mandamus lies to compel a constitutional duty.

A Mandamus is an extraordinary remedy in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the parties aggrieved, and when without its aid, there would be a failure of justice. Virginia, T & C Steel & Iron Co., v. Wilder, 14 S.E. 806. In this instant matter there is no ordinary mode that has not already been attempted, and with the summary denial of Petitioner's Writ, there is also a failure of justice. All have improperly acted on Petitioner's subject matter.

> "It (mandamus) ought to be used upon all occasions when the law has established no specific remedy, and there ought to be one. If there be a right, and no other specific remedy, the writ should not be denied." Lord Mansfield in Rex v. Barker, 3 Burr. 1265. See also Lord Ellenborough in Rex v. Archbishop of Canterberry, 8 East 219.

The Writ of Mandamus is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Peter sd. Abr. 438 (309). Petitioner has a clear right to expect his public ministers to perform in accordance with the Constitution, and when they fail to so perform the writ of mandamus must be issued.

All persons involved have failed to perform in compliance with either the Hawaii Constitution, or the Federal Constitution and the Mandamus must be issued.

The question is squarely before the Court and the issue and the time is ripe for consideration. The Court has a duty to evoke its jurisdiction in this case because it involves the private rights of every citizen in the state.

The words of Supreme Court Justice Brandeis are very appropriate in this matter when he stated:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means...would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Justice Brandeis, in Olmstead v. United States, 277 U.S. 438, 485 (1928).

When the judiciary fails to accept its responsibility and meet constitutional violations head on, then justice has died and the country will soon follow.

CONCLUSION

The record clearly establishes that:

1. Each court and government agency involved with Petitioner's claims are aware of the Constitutional requirements governing citizens rights.

2. The entire judicial system involved in Petitioner's claims had been made aware of the Constitutional provisions from the outset, and willfully and knowingly ignored said provisions, falsely accusing Petitioner under color of law of wrong doing, and therefore approved the actions of each individual implicated in the instant matter.
3. In addition, the fraudulent keeping of the original filings is an act in direct contravention with their oath to support and obey the Constitution of the United States of America. Their actions constitute a breach of contract with Petitioner.
4. Petitioner proved beyond any reasonable doubt, by settled decisions of law, supported by affidavits and asseverations in the original pleadings submitted to the HCC, HSC, and the HFDC, placing them in direct violation of the Federal and State Constitutions, and therefore the Ninth should have issued the Writ.
5. The HSC failed in their duty to issue a writ that was properly supported.
6. The HFDC and Ninth failed in their duty to issue a writ that was properly supported.
7. The summary actions by the aforesaid courts, not to mention the US Attorney and FBI, have left the Petitioner along with the citizens of Hawaii without a remedy within the state to rectify constitutional violations by any member of the executive, or judicial branches of government.

In this case the Petitioner, along with the people of Hawai'i, are being denied their day in court; Petitioner has been denied an action, thereby causing constitutional violations; been denied a hearing; been denied

privileges and immunities; been denied a republican form of government; and finally been denied due process of law.

By denying the Writ, the Ninth has denied Petitioner a remedy in those instances when his public ministers (executive, and judicial) are not complying with the Supreme law of the land. The law wills that:

> "In every case where a man is wronged and endamaged, he shall always have a remedy." Coke on Littleton 197b; Branch's Principia Legis et Equitatis; Broom's Legal Maxims 192, John Bouvier's Institutes of American Law 2411.

When the lower courts refuse to address federal Constitutional issues, the United States Supreme Court must intercede and order the lower courts to, as a minimum, hear the issue in order to protect the rights of the citizens of the states.

Therefore, the United States Supreme Court must exercise its jurisdiction in this case or lawlessness will reign supreme in Hawai'i. If it will not, then the federal and state Constitutions need to be pronounced either dead or obsolete.

> "Behold, I have taught you statutes and judgments, even as the LORD my God commanded me, that you should do so in the land whither you go to possess it. Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people." Deut. 4:5-6.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 20th, day of January, 1999

Gerald Theodore, Michaud - Petitioner

NO. _____

IN THE

SUPREME CO'RT OF THE UNITED STATES

OCTOBER TERM, 1998

Gerald Theodore, Michaud - Petitioner

VS.

CHIEF JUDGE HUG; SCHROEDER, KOZINSKI, FARRIS, BRUNETTI and SILVERMAN CIRCUIT JUDGES - RESPONDENT(S)

and

UNITED STATES MAGISTRATE JUDGE FRANCIS I. YAMASHITA & UNITED STATES DISTRICT JUDGE SAMUEL P. KING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, AND U.S. SOLICITOR GENERAL et al,

Real Parties in Interest.

PROOF OF SERVICE

I, Gerald Theodore, Michaud, do declare that on this date, January 23, 1999, as required by Supreme Court Rule 29 I have served the enclosed Informal Petition For A Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Honorable Chief Judge Hug, Honorable Schroeder, Kozinski,
Farris, Brunetti and Silverman Circuit Judges
United States Court of Appeals For The Ninth Circuit
95 Seventh Street
San Francisco, CA 94119-3939

Honorable U.S. Magistrate Francis I. Yamashita
United States Courthouse, Room C-340
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Honorable U.S. District Judge Samuel P. King
United States Courthouse, Room Aha Kanawai
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Honorable Supreme Court Justices,
Ronald Moon, Robert Klien, Paula
Nakayama, Steven Levinson, & Mario Ramil
417 South King Street
Honolulu, Hawaii 96813-2911

The Honorable E. John McConnell & Boyd P. Mossman
Second Circuit Court
2145 Main St.
Wailuku, Maui, Hawaii 96793

The Honorable Margery Bronster
Department of the Attorney General
425 Queens Street
Honolulu, HI 96813

State Farm Ins. Co., Robert (Bob) Yoshino; Scott A. Gilmore;
Karen Perreira; Frances Yost; A. Don Smith; Monique Catcott,
C/O Attorneys McCorriston Miho Miller Mukai
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813

Kihei Rent A Car Company & Crawford & Company
C/O Attorneys Tam O'Connor & Henderson
Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813

State Of Hawaii Insurance Division, Dept. of Com. & Cons. Affairs
Atten: Mr. Wayne Metcalf, Insurance Commissioner
P.O. Box 3614
Honolulu, Hawaii 96811-3614

United States Attorney, Stephen Alm
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Rm. 6100
Honolulu, Hawaii 96850

Federal Bureau of Investigation
Attn. Hal Marshal, FBI Agent
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Rm. 4307
Honolulu, Hawaii 96850

US Department of Justice
Ben Franklin Station, Box 683
Washington, D.C. 20044

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28th, 1999

Gerald Theodore, Michaud - Petitioner

APPENDIX "A"

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS JUL 24 1998

FOR THE NINTH CIRCUIT CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GERALD T. MICHAUD Plaintiff-Appellant, v. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive, Defendants-Appellees.	No. 96-17212 D.C. No. CV-96-00155 SPK
GERALD T. MICHAUD Plaintiff-Appellee, v. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT, Defendants-Appellants,	No. 96-15387 D.C. No. CV-96-00155 SPK

JOHN DOES 1-10, inclusive; JANE DOES, 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive, Defendants.	)	MEMORANDUM[1]

Appeal from the United States District Court
District of Hawaii
Samuel P. King, Senior Judge, Presiding

Submitted July 20, 1998[2]

Before: HUG, Chief Judge; SCHROEDER and KOZINSKI, Circuit Judges

Gerald T. Michaud appeals pro se the district court's dismissal without prejudice of his action against State Farm Mutual Insurance Company and others. State Farm cross-appeals, asserting the dismissal should have been with prejudice. We affirm.

The district court did not abuse its discretion by dismissing the complaint for failure to comply with a court order, where Michaud failed to appear at two pretrial conferences and, after being warned that he risked dismissal, failed to provide an adequate response to, or appear at a hearing as ordered in, the district court's order to show cause for his failure to appear at the first conference. *See Toth v. Trans World Airlines, Inc.*, 862

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

F.2d 1381, 1385 (9th Cir. 1988) (dismissal for failure to comply with court order reviewed for abuse of discretion).

With regard to State Farm's cross-appeal, we cannot say that the district court's decision to dismiss without prejudice, rather than with prejudice, constituted an abuse of discretion. See generally *Hernandez v. City of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998) (noting considerations which make dismissal with prejudice more difficult to justify than dismissal without prejudice). The judgment, accordingly, is

AFFIRMED.

---

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD Plaintiff, vs. STATE FARM MUTUAL, AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	CIV. NO. 96 00155 SPK ORDER FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII OCT 15 1996 at 10 o'clock and 50 min. AM WALTER A. Y. H. CHINN, CLERK By

ORDER ADOPTING MAGISTRATE'S
FINDINGS AND RECOMMENDATION

On November 7, 1995, Plaintiff pro se Gerald T. Michaud ("Michaud") filed a complaint in the Circuit Court of the Second Circuit State of Hawaii against Defendant State Farm Automobile Insurance Company ("State Farm"). State Farm filed a Notice of Removal on February 15, 1996. Michaud filed a "Response" to the Notice of Removal on March 8, 1996. Michaud neither filed a motion nor made an informal request in his "response" to remand the case back to the Second Circuit Court. Michaud did not argue that the Notice of Removal was procedurally defective. Michaud's argument was that the Notice violated Rule 11 of the Federal Rules of Civil Procedure. He informally suggested that he court sua sponte impose sanctions against State Farm. The court did not impose any Rule 11 sanctions.

By order dated February 15, 1996, the court set a Rule 16 pretrial conference with Magistrate Judge Francis Yamashita for May 13, 1996. Michaud failed to appear at the May 13 conference and failed to file a meeting of the parties statement as required by Local Rule 230-1(d). On May 15, 1996 the court rescheduled the conference to June 4, 1996, ordering Michaud to appear and to show cause for failure to appear at the May 13 conference. The order warned that failure to respond would result in dismissal of the case. On May 23, 1996, Michaud filed a response to the court's order to show cause, stated that he "refutes the validity of Defendant's authority to remove this suit from state court," and requested the court to "remand this matter for probable cause." Michaud returned his copy of the order to show cause and did not appear at the June 4 conference. The court has not been able to issue a trial schedule because Michaud has not appeared at the pretrial conferences.

Magistrate Judge Yamashita issued Findings and Recommendation on September 3, 1996 for the issue of Michaud's failure to attend the pretrial conferences. The Magistrate found that Michaud's failure to attend the conferences was an inexcusable violation of a court order and recommended that this court dismiss the action without prejudice. Michaud filed a Memorandum in response to Findings and Recommendation on September 9, 1996. Michaud made twenty-two arguments in response to the Findings and Recommendation. The arguments allege defects in the removal procedure and challenge the court's jurisdiction in this matter, but otherwise do not offer any explanation for his failure to attend the conferences.

II. STANDARD OF REVIEW

This court reviews de novo a Magistrate's dispositive proposed orders, findings, or recommendations. Local Rule 404-2.

III. DISCUSSION

Michaud alleges a number of procedural defects in State Farm's removal of the action to this court. Statute provides that:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. 1447 (c). State Farm filed notice of removal on February 15, 1996. The deadline for Michaud to file a motion to remand the case based on defects in the removal process passed in March. Michaud did not raise any arguments alleging specific procedural defects until more than five months after the deadline when he filed his memorandum in response to the Magistrate's Findings and Recommendation on September 9, 1996.

The record shows that Michaud first contested State Farm's authority to remove the case in his May 23 memorandum. May 23 was still well beyond the deadline to raise procedural defects in removal, but even then, Michaud's argument against removal was based on lack of subject matter jurisdiction rather than procedural defects. Michaud filed a "Demand for Proof of Jurisdiction" on May 28, 1996. The court interpreted this document as a Motion to Remand for Lack of Subject Matter Jurisdiction. The court denied the motion/demand on July 5, 1996.

Michaud's procedural arguments challenging removal to this court are not timely. However, a litigant may raise the issue of whether the court has subject matter jurisdiction at any time. The statute directs the district court to remand the case back to the state court if it appears at any time before final judgment that the federal court lacks subject matter jurisdiction. Id. (emphasis added). Upon review of Michaud's arguments, the court concludes for the same reasons explained in its July 5 order that there is proper subject matter jurisdiction in this case based on diversity of citizenship.

Having concluded that the court has jurisdiction over this matter, the court turns to the Magistrate's Findings and Recommendation. This court may dismiss an action under Rules 16 (f), 37 (b), or 41 (b) for failure to comply with court rules or court orders. See Morris v. Morgan Stanley & Co., 942 F.2d 648, 650 (9th Cir. 1991). A involuntary dismissal may be with or without prejudice. Johnson v. U.S. Department of the Treasury, 939 F.2d 820, 825 (9th Cir. 1991). The court should afford the litigant prior notice of its intention to dismiss. Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987), cert. Denied 488 U.S. 819 (1988). The sanction of dismissal without prejudice is appropriate when a pro se litigant refuses to obey a Magistrate's orders in face of warnings that such conduct could result in dismissal of the case. See, e.g., Dukes v. New York City Police Com'r Ward, 129 F.R.D. 478 (S.D.N.Y. 1990).

The court agrees with the Magistrate's conclusion that Michaud failed to articulate a legitimate reason for failing to comply with a court order. The court warned Michaud that failure to comply would result in dismissal of the case. Accordingly, this court ADOPTS the Magistrate's Findings and Recommendation and DISMISSES the case without prejudice.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 15, 1996.

SAMUEL P. KING
United States District Judge

APPENDIX "C"

FILED

NOV 4 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD T. MICHAUD

Plaintiff-Appellant,

v.

STATE FARM INSURANCE, et al.,

Defendants-Appellee.

No. 96-17212
No. 97-15387

D.C. No.
CV-96-00155-SPK
Hawaii (Honolulu)

ORDER

Before: Chief Judge HUG; SCHROEDER and KOZINSKI, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "D"

JUDGMENT

==========

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-17212
CT/AG# : CV-96-00155-SPK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 20 1998

at 2 o'clock and 10 min. PM
WALTER A. Y. H. CHINN, CLERK

GERALD T. MICHAUD

Plaintiff-Appellant,

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive,

Defendants-Appellees.

No. 96-15387
CT/AG# : CV-96-00155-SPK

GERALD T. MICHAUD

Plaintiff-Appellee,

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT

Defendants-Appellants,

JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive,

Defendants

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered - 7/24/98.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

NOV 13 1998

by: _____
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 3 1999
CLERK

No. 98-1218

In The

Supreme Court of the United States

October Term, 1998

Gerald Theodore Michaud,

Petitioner,

vs.

State Farm Mutual Automobile Insurance Company,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although Petitioner Gerald Michaud raises a number of extraneous issues, the only proper questions presented by the Petition for Writ of Certiorari are:

1) Whether this Court should review the determination by the Ninth Circuit Court of Appeals that removal of this action to federal court was proper.

2) Whether this Court should review the determination by the Ninth Circuit Court of Appeals that this case was properly dismissed without prejudice due to Petitioner's refusal to appear before the District Court and failure to obey an order by the District Court.

Respondent State Farm Mutual Automobile Insurance Company objects to the Questions Presented as set forth in the Petition for Writ of Certiorari, as those questions were never properly before the Ninth Circuit Court of Appeals.

LIST OF PARTIES

The parties to the action before the Ninth Circuit Court of Appeals were:

1) Petitioner Gerald T. Michaud ("Michaud").

2) Respondent State Farm Mutual Automobile Insurance Company ("State Farm"). Pursuant to Supreme Court Rule 29.6, Respondent states that State Farm Insurance Companies is the parent of Respondent.

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OPINIONS BELOW

The Judgment and Memorandum Order of the United States Court of Appeals for the Ninth Circuit are unreported and appear in Appendices "A" and "B" respectively. The Judgment and Order of the United States District Court are unreported and appear in Appendices "C" and "D" respectively.

STATEMENT OF JURISDICTION

Petitioner Gerald Michaud has based jurisdiction solely on this Court's authority under 28 U.S.C. § 1254(1) to review cases from the United States Courts of Appeals. Michaud's Petition, however, also apparently attempts to invoke this Court's discretionary power to issue a writ of mandamus, which arises under 28 U.S.C. § 1651(a). Apart from its many technical defects, Michaud's Petition is insufficient to trigger this Court's discretionary power to issue a writ of mandamus because the Petition fails to meet the criteria of United States Supreme Court Rule 20.[1]

[1] Petitioner seeks a writ of mandamus from this Court without properly invoking the Court's jurisdiction under 28 U.S.C. § 1651(a). Michaud's Petition suffers from further defects under United States Supreme Court Rule 20. For example, the Petition's caption does not conform to Rule 20, and Michaud has failed to "set out with particularity why the relief sought is not available in any other court." Supreme Court Rule 20.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1441 (West 1998) reads, in part, as follows:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1446 (West 1998) reads, in part, as follows:

Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court, shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon

the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

STATEMENT OF THE CASE

A. Nature of the Case

This action originally arises from Michaud's claims for insurance benefits under an automobile insurance policy issued by State Farm. On April 29, 1994, Michaud contends that he was involved in an automobile accident on the Island of Maui, State of Hawaii ("the accident"). In his Complaint, Michaud alleges that State Farm failed to

provide no-fault benefits which he contends are due and owing to him as a result of the accident. Michaud further contends, *inter alia*, that State Farm failed to properly investigate his claim and have improperly denied payment. (App. "E").

In response, State Farm contends, *inter alia*, that Michaud's policy for his 1975 Mercedes – which was involved in the accident – was properly canceled due to non-payment of premiums. The policy had been canceled approximately four months before the accident.

B. Proceedings Below

This action was initially filed by Michaud on November 7, 1995 in the Circuit Court of the Second Circuit, State of Hawaii ("Second Circuit Court"), docketed as Civil No. 95-0844(1). The Complaint named as defendants State Farm and numerous individual employees of State Farm ("Individual Defendants"). Defendants subsequently brought a Motion To Dismiss Complaint against the Individual Defendants. At a hearing on February 13, 1996, the Second Circuit Court ordered dismissal of the Individual Defendants. The only remaining defendant was State Farm.

On February 15, 1996, State Farm filed a Notice of Removal to the United States District Court for the District of Hawaii ("District Court"), where the case was docketed as Civil No. 96-0155 SPK. Given the dismissal of the Individual Defendants in the Second Circuit Court, there was diversity of citizenship between the remaining parties (Michaud and State Farm), and the case thus

became removable. The case was properly removed pursuant to 28 U.S.C. § 1441 and § 1446. An additional ground for removal was that the Individual Defendants had been fraudulently joined. (App. "F").

On October 15, 1996, the District Court issued an Order Adopting Magistrate's Findings and Recommendations, wherein the Court dismissed the case without prejudice. (App. "D"). On October 17, 1996, the District Court entered Judgment against Michaud. (App. "C").

Michaud appealed the District Court's decision. On July 24, 1998, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") issued its Judgment affirming the District Court's decision. Thereafter, Michaud filed a Petition for Rehearing En Banc, which the Ninth Circuit denied in its Order of November 4, 1998.

C. Statement of Facts

From the very outset, Michaud failed to recognize and respect the authority of the District Court over this matter. Within a month of the removal to the District Court, he filed Plaintiff Gerald T. Michaud's Notice Not To Consent To Proceed Before A United States Magistrate. (App. "G").

In his Scheduling Conference Statement filed April 24, 1996, Michaud ignored the District Court's order of February 15, 1996 to submit a Scheduling Conference Statement which met the requirements of Rule 16 of the Federal Rules of Civil Procedure and Rule 235-3 of the Local Rules of the District Court. Instead, Michaud's Scheduling Conference Statement simply asserted that

the State of Hawaii's Second Circuit Court maintained original jurisdiction in this action. Moreover, Michaud refused to schedule or attend a requisite meeting of the parties, and failed to submit a statement regarding meeting of the parties.

On May 13, 1996, Michaud failed to appear for the Scheduling Conference before Magistrate Francis I. Yamashita. As a result, an Order To Show Cause was issued by Magistrate Yamashita. This Order warned Michaud that failure to respond would result in dismissal of the case. (App. "H").

On May 23, 1996, Michaud submitted Plaintiff Gerald T. Michaud's Response To Order To Show Cause, in which he stated that he is "returning this Honorable Court's Order to Show Cause WITHOUT DISHONOR". (App. "I"). Michaud indicated that he refuted State Farm's authority to remove this case, and instead of addressing the District Court's Order To Show Cause, he demanded certain information from State Farm and the District Court.

On May 28, 1996, Plaintiff Gerald T. Michaud's Demand For Proof Of Jurisdiction was filed. Therein, Michaud asserted that "[t]his Honorable Court through negligence per se is attempting to coerce Plaintiff into its foreign jurisdiction". (App. "J"). State Farm thereafter filed a response memorandum addressing the jurisdictional issues. On July 5, 1996, the District Court issued an Order Denying Plaintiff's Demand For Proof of Jurisdiction. (App. "K"). To address the issues raised by Michaud, the District Court treated Michaud's "Demand" as a Motion To Remand. In its Order, the District Court held

that: 1) the requisite amount in controversy had been met; 2) there is diversity of citizenship; and 3) removal was proper.

Meanwhile, on June 4, 1996, *Michaud failed to appear before the District Court for the second time.* He thus completely ignored and disobeyed the District Court's direct order to appear as set forth in the Order To Show Cause. As a result, on September 3, 1996, the Magistrate issued a Findings And Recommendation, which recommended that "Plaintiff's complaint be dismissed without prejudice for failure to obey a court order." (App. "L").

Notwithstanding the above, Michaud continued to directly challenge the authority and integrity of the District Court. On September 18, 1996, he filed a Notice Of Refusal in which he indicated that he was "REFUSING" briefs submitted by State Farm and the Orders issued by the District Court. (App. "M"). Moreover, he accused the District Court (and defense counsel) of, *inter alia*, deprivation of his rights, extortion, conspiracy against his rights, perjury, false swearing, and fraud.

On October 15, 1996, the District Court issued its Order Adopting Magistrate's Findings And Recommendation. (App. "D"). Thereafter, Michaud filed a "Writ of Error" which the District Court treated as a Notice of Appeal. The appeal went to a panel of three Ninth Circuit Court of Appeals judges ("Ninth Circuit"). The Ninth Circuit concluded that the District Court decision to dismiss was within its discretion given Michaud's repeated noncompliance with court orders and court procedure.

(App. "B"). Upon the Ninth Circuit's decision to affirm, Michaud filed his Petition to this Court.

ARGUMENT

Michaud's Petition appears to both appeal the Ninth Circuit's decision and request a writ of mandamus. *See* Petition at 19-22. Both Michaud's Petition for Writ of Certiorari and Petition for Writ of Mandamus rest upon Michaud's mistaken belief that the proceedings below curtailed his constitutional rights. Neither Petition justifies this honorable Court's review.

United States Supreme Court Rule ("Supreme Court Rule") 10 requires a showing of "compelling reasons" to justify the discretionary grant of a writ of certiorari. Such reasons include, but are not limited to: (1) a conflict of decisions among the federal appellate courts or between a federal appeals court and the highest state court; (2) a significant departure from usual proceedings; or (3) an important question of federal law. Supreme Court Rule 10. Michaud's Petition for Writ of Certiorari fails to raise a "compelling reason" under any of the above categories.

Michaud has cloaked his fundamentally flawed Petition under an array of constitutional attacks on the federal judicial system. These attacks stem from Michaud's belief that the legitimate procedures strictly followed by the District Court and the Ninth Circuit somehow violated his constitutional rights. *See* Petition at 2-3. Notwithstanding Michaud's insistence to the contrary, the procedures below were correctly applied in this case and in no way threatened Michaud's constitutional rights.

The lower courts conducted themselves with diligence and forbearance.

Due to his frustration with not only the court system but also federal and state agencies, Michaud also seeks a writ of mandamus and names numerous additional "parties" in his Petition who are not truly parties to this action. Under Supreme Court Rule 20, this Court has the power to issue the extraordinary remedy of mandamus only in the most exceptional cases. Certainly this Petition does not qualify as such a case where Petitioner Michaud has alternative remedies available to him and his reasons for seeking the Petition are based on his misunderstanding of both the law and court procedure.

A. The Instant Petition Fails To Raise A Compelling Reason To Justify A Writ Of Certiorari And, Therefore, Should Be Denied.

Petitioner Michaud's arguments express a belief that the lower courts' procedures denied him his "day-in-court." *See* Petition at 2-3. This belief obviously results from Michaud's unfamiliarity with court procedure.

To the extent that Michaud's lack of experience with judicial procedures has led him to question the constitutionality of the proceedings below, his Petition is untenable. From the initial removal of the case to federal court through the Ninth Circuit's affirmance of the District Court's dismissal, the lower courts have followed, without deviation, the rules of civil and appellate procedure, which are presumptively constitutional. 1 Moore's Federal Practice 3d § 1.05 (1998) (quoting *Business Guides, Inc. v. Chromatic Enters., Inc.*, 498 U.S. 533, 552-3, 111 S. Ct.

922, 112 L.Ed. 2d 1140 (1991)). For the reasons set forth below, the instant Petition for Writ of Certiorari should be denied.

1. The Removal Of The Instant Action To The Federal District Court Proceeded Under Both Statutory And Constitutional Authority.

Michaud has no legitimate basis to challenge federal jurisdiction over the instant action. Even though Michaud originally filed his Complaint in the Second Circuit Court of the State of Hawaii, once the State Court dismissed the nondiverse defendants, State Farm properly sought removal to the federal District Court on the basis of diversity of citizenship. This Court has already determined that a plaintiff who opposes removal of a case from a state court to a federal district court errs in relying on the principle that a plaintiff, as master of the complaint, can choose to have the cause heard in state court. *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 139 L.Ed. 2d 525 (1997). By filing a claim against a diverse party, Michaud subjected himself to the possibility that State Farm would exercise its right to remove the case to the federal court.

Removal is specifically authorized pursuant to 28 U.S.C. § 1441, which states in pertinent part:

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

> embracing the place where such action is pending.

At the time this action was removed, pursuant to 28 U.S.C. § 1332, the District Court had original jurisdiction over civil actions where the matter in controversy exceeded $50,000 and was between citizens of different states. Once the State Court dismissed the Individual Defendants named in Michaud's Complaint, there was diversity of citizenship between the remaining parties (State Farm and Michaud) and the action became removable. State Farm timely removed the action within 30 days of it becoming removable.[2] 28 U.S.C. § 1446(b) (1994).

Federal courts have long recognized the "validity of such congressional acts. . . . authorizing the removal of suits of a civil nature from state to federal court for diversity of citizenship." *Kithcart v. Metropolitan Life Ins. Co.*, 150 F.2d 997, 1001 (8th Cir. 1945) (citing *Gaines v. Fuentes*, 92 U.S. 10, 18, 23 L.Ed. 524 (1875)). A foreign corporation has a constitutional right to resort to the federal courts, and removal, where the federal court has original jurisdiction over the case, is a proper means of exercising this right. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 42 S. Ct. 188, 66 L.Ed. 352 (1922) (holding unconstitutional state action curtailing a foreign corporation's constitutional right to resort to the federal courts).

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[2] Upon Michaud's demand for proof of jurisdiction, the District Court reviewed the propriety of federal jurisdiction over this matter and found that the District Court "ha[d] original jurisdiction under diversity of citizenship[.]" (App. "K"). In its order, the District Court confirmed the propriety of removal under 28 U.S.C. § 1332 and § 1441.

Accordingly, State Farm merely exercised its right to resort to the District Court under diversity jurisdiction.

In an Eighth Circuit case factually similar to the instant action, an insured brought suit against the insurer in state court. *Kithcart*, 150 F.2d 997. The insurer removed the case to federal court on diversity of citizenship grounds. *Id.* In his appeal, the insured argued that the removal statutes were unconstitutional. *Id.* at 1001. After surveying the history and purpose of removal statutes, the court concluded that "[t]he validity of [the removal statutes]. . . . is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government." *Id.* The court, therefore, rejected the insured's claim that the removal statutes abridged his constitutional rights. *Id.*

Likewise, Michaud's Petition fails to raise any serious constitutional attack on the removal procedures applied by the lower court. Michaud filed his Complaint in the State Court, but by naming a diverse defendant, he subjected himself to the possibility that State Farm would avail itself of federal jurisdiction once the non-diverse parties were dismissed. Upon review, the District Court found that the requirements for diversity had been met and that removal was proper. The Ninth Circuit affirmed the District Court's decision. This Court need not grant Michaud's Petition only to reaffirm the legitimacy of the removal procedure, which is historically unchallenged and widely recognized as valid.

2. Michaud's Intentional Refusal To Cooperate With The District Court's Orders Prompted The Dismissal Of The Instant Action.

Even after the District Court determined federal jurisdiction to be proper, Michaud continued to refuse to participate in the District Court proceedings. A district court has discretion to dismiss claims "for failure to prosecute or to comply with a court order or any federal rule." 8 Moore's Federal Practice § 41.50. Indeed, Rule 41(b) of the Federal Rules of Civil Procedure ("FRCP") authorizes involuntary dismissals under such circumstances. Additionally, FRCP, Rules 16(f) and 37(b) specifically permit dismissal for failure to comply with discovery rules.

Michaud's consistent noncompliance and blatant disobedience during the lower court proceedings justified the District Court's decision to dismiss under any of the above rules. Michaud disobeyed the local and federal rules requiring a prehearing meeting by refusing to meet with State Farm's counsel. Michaud further refused to submit a proper scheduling conference statement. He knowingly disregarded the authority of the District Court by failing to comply with two court orders and to appear at hearings after being warned by the court that failure to appear would result in dismissal.

In Magistrate Judge Yamashita's Findings and Recommendation of September 3, 1996, he specifically held that Michaud had *twice* failed to appear for hearings after being ordered to do so (once on May 13, 1996 and once on June 19, 1996). Magistrate Yamashita further found that

"Plaintiff . . . fail[ed] to articulate a legitimate reason for not complying with court orders," and that "Plaintiff's failure to appear at . . . the order to show cause hearing is inexcusable." (App. "L"). Clearly, Michaud's persistent disregard for the District Court's authority compelled a dismissal.

3. The Ninth Circuit Properly Affirmed The District Court's Decision To Dismiss.

The Ninth Circuit followed proper appellate procedure in its review of the District Court's decision to dismiss. Indeed, Michaud's somewhat incoherent contentions in his Petition fail to raise any legitimate points of error.[3]

Upon the filing of Michaud's "Writ of Error," which the District Court treated as a Notice of Appeal, the Ninth Circuit exercised its appellate jurisdiction under 28 U.S.C. § 1291. Section 1291 provides that the Court of Appeals shall have jurisdiction of appeals from final decisions of the District Courts. The Panel of three judges reviewed the appeal according to the Ninth Circuit's usual practice. The Ninth Circuit reviewed the appeal without oral argument. Under the authority of Federal Rules of Appellate

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[3] Michaud contends, among other things, that "the Ninth [Circuit] summarily and arbitrarily denied . . . Writ without, as a minimum, a hearing, when a fair trial in a fair tribunal is a basic requirement of due process." Petition at 2. He also accuses the Ninth Circuit Panel of "bias" and of "depart[ing] from the accepted and usual course of judicial proceedings." *Id.*

Procedures, ("FRAP"), Rule 34, the Ninth Circuit determined oral argument to be unnecessary. The Ninth Circuit notified the parties of its decision and invited statements in opposition as required under FRAP 34 and Circuit Rule 34-4. (App. "N").

Pursuant to clearly established law, the Ninth Circuit Court properly reviewed the District Court's dismissal under the abuse of discretion standard. *See Toth v. Transworld Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988). In its Memorandum, the Ninth Circuit Court declared that:

> [t]he district court did not abuse its discretion by dismissing the complaint for failure to comply with a court order, where Michaud failed to appear at two pretrial conferences and, after being warned that he risked dismissal, failed to provide an adequate response to, or appear at a hearing as ordered in, the district court's order to show cause for his failure to appear at the first conference.

(App. "B"). Similar to most appellate courts, the Ninth Circuit affirmed the decision to dismiss without prejudice as within the District Court's discretion. 8 Moore's Federal Practice § 41.53. Michaud requested a rehearing en banc, but his request was denied. Generally, a hearing or rehearing en banc is not favored and "ordinarily will not be ordered[.]" FRAP 35.

Far from arbitrary, the Ninth Circuit's decision reflects a reasoned and careful review of the circumstances surrounding the District Court's dismissal and the case law supporting its decision. The Ninth Circuit's strict adherence to case law and the rules of procedure

defeats Michaud's claims of bias and renders his Petition frivolous.

Michaud has apparently filed his Petition for Writ of Certiorari due to a misunderstanding of judicial procedures. The lower courts did not deviate from the usual course of proceedings, except perhaps to the extent that they tried to accommodate Michaud as a pro se litigant. Neither have the lower courts infringed on any of Michaud's constitutional rights. Michaud's Petition does not rely on an accurate understanding of court practice, but rather on ill-informed expectations. Such misconceptions of law and fact do not give rise to the compelling reasons justifying a writ of certiorari from this honorable Court. Michaud's petition for Writ of Certiorari should, therefore, be denied.

B. The Instant Petition Clearly Fails To Support The Exceptional Issuance Of A Writ Of Mandamus.

A writ of mandamus falls within this Court's discretionary power to issue an extraordinary writ under 28 U.S.C. § 1651(a) and Rule 20 of the Rules of the United States Supreme Court. Such extraordinary relief, however, "must be reserved for only truly extraordinary cases." 23 Moore's Federal Practice § 520.02. A petition for an extraordinary writ must meet certain prerequisites specified in Supreme Court Rule 20. *Id.*

Such a petition must show that: (1) the writ will be in aid of the Court's appellate jurisdiction; (2) exceptional circumstances warrant the exercise of the Court's discretionary powers; (3) adequate relief cannot be had in any

other form, and (4) adequate relief cannot be had from any other court. *Id.* Michaud's Petition satisfies none of these prerequisites.

As shown above, Michaud's petition is wholly without merit. The federal court judges have proceeded in accordance with normal court procedure, respecting both the court rules and Michaud's status as a pro se litigant. Indeed, it is apparent that the federal courts have gone out of their way to accommodate Michaud.

As for Michaud's assertions against various Federal and State government officials, such claims exceed the scope of the lower court proceedings. These government officials have not been involved in the lower court proceedings and should not be considered parties in interest. Michaud appears to have included these parties out of his misunderstanding of federal court jurisdiction and not because of any misconduct on their behalf.

In this respect, Michaud's Petition can be of no aid to this Court's appellate jurisdiction as there has been no error committed. Similarly, the faulty logic behind this Petition does not present any exceptional circumstance of a kind to warrant an extraordinary writ. *See In Re Michael Sindram*, 498 U.S. 177, 179, 11 S. Ct. 269, 112 L.Ed. 2d 599 (1991) (finding that petitioner failed to identify "drastic circumstance to justify extraordinary relief" as required by Supreme Court Rule 20.1); *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 19 L.Ed. 2d 305 (1967) (stating that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy").

Moreover, Michaud has sought an extraordinary writ where alternative relief is available. "[S]uch remedies should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260, 67 S. Ct. 1558, 91 L.Ed. 2041 (1947). "It is well settled that where a party had the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus[.]" *Ex parte Tiffany*, 252 U.S. 32, 37, 40 S. Ct. 239, 64 L.Ed. 445 (1920). Michaud's appeal to this Court from the Ninth Circuit's decision addresses the same concerns as those raised in his Petition for a Writ of Mandamus. "[I]f the complaining party has an adequate remedy[,]. . . . the writ will ordinarily be denied." *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 41 S. Ct. 288, 65 L.Ed. 631 (1921). Michaud's ability to raise the instant appeal to this Court defeats his request for a Writ of Mandamus. Michaud's Petition has failed to meet all four prerequisites to the issuance of an extraordinary writ. This Court, therefore, should deny his Petition.

CONCLUSION

Michaud has persisted in his unjustified rejection of federal jurisdiction over the instant case, despite the clear mandate of the law and federal court practice. His insistence has forced the federal judiciary and State Farm to expend a great deal of resources in addressing his unfounded objections and appeals. Michaud now asks this Court to review the Ninth Circuit's decision and further requests a writ of mandamus against various government officials and agencies without any legitimate grounds for doing so. The proceedings below were lawful

and in accordance with valid procedural rules. The instant Petition, therefore, fails to justify consideration of a writ of certiorari or a writ of mandamus. For the foregoing reasons, State Farm respectfully requests that this honorable Court deny Michaud's Petitions for Writ of Certiorari and for Writ of Mandamus.

Dated: Honolulu, Hawaii, March 3, 1999.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-17212
CT/AG#: CV-96-00155-SPK

GERALD T. MICHAUD

Plaintiff – Appellant

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive

Defendants – Appellees

NO. 97-15387
CT/AG#: CV-96-00155-SPK

GERALD T. MICHAUD

Plaintiff – Appellee

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT

Defendants – Appellants

JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive

Defendants

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered – 7/24/98.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALD T. MICHAUD, Plaintiff-Appellant, vs. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive, Defendants-Appellees.	NO. 96-17212 D.C. No. CV-96-00155-SPK
GERALD T. MICHAUD, Plaintiff-Appellee, vs. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT, Defendants-Appellants	No. 97-15387 D.C. No. CV-96-00155-SPK

JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive, CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive, Defendants.	) MEMORANDUM[1]

Appeal from the United States District Court
District of Hawaii
Samuel P. King, Senior Judge, Presiding
Submitted July 20, 1998[2]

Before: HUG, Chief Judge; SCHROEDER and KOZINSKI, Circuit Judges.

Gerald T. Michaud appeals pro se the district court's dismissal without prejudice of his action against State Farm Mutual Insurance Company and others.

State Farm cross-appeals, asserting the dismissal should have been with prejudice. We affirm.

The district court did not abuse its discretion by dismissing the complaint for failure to comply with a court order, where Michaud failed to appear at two pre-trial conferences and, after being warned that he risked dismissal, failed to provide an adequate response to, or

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

appear at a hearing as ordered in, the district court's order to show cause for his failure to appear at the first conference. *See Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1385 (9th Cir. 1988) (dismissal for failure to comply with court order reviewed for abuse of discretion).

With regard to State Farm's cross-appeal, we cannot say that the district court's decision to dismiss without prejudice, rather than with prejudice, constituted an abuse of discretion. *See generally Hernandez v. City of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998) (noting considerations which make dismissal with prejudice more difficult to justify than dismissal without prejudice). The judgment, accordingly, is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.

JUDGMENT IN A CIVIL CASE

Case Number:
CIVIL 96-00155SPK

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that this case is DISMISSED Without Prejudice.

cc: all counsel

OCTOBER 17, 1996
Date

WALTER A.Y.H. CHINN
Clerk

/s/ Walter A.Y.H. Chinn
(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	)	CIVIL NO. 96-00155 SPK ORDER

ORDER ADOPTING MAGISTRATE'S FINDINGS AND RECOMMENDATION

On November 7, 1995, Plaintiff pro se Gerald T. Michaud ("Michaud") filed a complaint in the Circuit Court of the Second Circuit State of Hawaii against Defendant State Farm Automobile Insurance Company ("State Farm"). State Farm filed a Notice of Removal on February 15, 1996. Michaud filed a "Response" to the Notice of Removal on March 8, 1996. Michaud neither filed a motion nor made an informal request in his "Response" to remand the case back to the Second Circuit Court. Michaud did not argue that the Notice of Removal was procedurally defective. Michaud's argument was that the Notice violated Rule 11 of the Federal Rules of Civil Procedure. He informally suggested that the court *sue sponte* impose sanctions against State Farm. The court did not impose any Rule 11 sanctions.

By order dated February 15, 1996, the court set a Rule 16 pretrial conference with Magistrate Judge Francis Yamashita for May 13, 1996. Michaud failed to appear at the May 13 conference and failed to file a meeting of the parties statement as required by Local Rule 230-1(d). On May 15, 1996 the court rescheduled the conference to June 4, 1996, ordering Michaud to appear and to show cause for failure to appear at the May 13 conference. The order warned that failure to respond would result in dismissal of the case. On May 23, 1996, Michaud filed a response to the court's order to show cause, stated that he "refutes the validity of Defendant's authority to remove this suit from state court," and requested the court to "remand this matter for probable cause." Michaud returned his copy of the order to show cause and did not appear at the June 4 conference. The court has not been able to issue a trial schedule because Michaud has not appeared at the pretrial conferences.

Magistrate Judge Yamashita issued Findings and Recommendation on September 3, 1996 for the issue of Michaud's failure to attend the pretrial conferences. The Magistrate found that Michaud's failure to attend the conferences was an inexcusable violation of a court order and recommended that this court dismiss the action without prejudice. Michaud filed a Memorandum in Response to Findings and Recommendation on September 9, 1996. Michaud made twenty-two arguments in response to the Findings and Recommendation. The arguments allege defects in the removal procedure and challenge the court's jurisdiction in this matter, but otherwise do not offer any explanation for his failure to attend the conferences.

II. STANDARD OF REVIEW

This court reviews *de novo* a Magistrate's dispositive proposed orders, findings, or recommendations. Local Rule 404-2.

III. DISCUSSION

Michaud alleges a number of procedural defects in State Farm's removal of the action to this court. Statute provides that:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. 1447(c). State Farm filed notice of removal on February 15, 1996. The deadline for Michaud to file a motion to remand the case based on defects in the removal process passed in March. Michaud did not raise any arguments alleging specific procedural defects until more than five months after the deadline when he filed his memorandum in response to the Magistrate's Findings and Recommendation on September 9, 1996.

The record shows that Michaud first contested State Farm's authority to remove the case in his May 23 memorandum. May 23 was still well beyond the deadline to raise procedural defects in removal, but even then, Michaud's argument against removal was based on lack of subject matter jurisdiction rather than procedural defects. Michaud filed a "Demand for Proof of Jurisdiction" on

May 28, 1996. The court interpreted this document as a Motion to Remand for Lack of Subject Matter Jurisdiction. The court denied the motion/demand on July 5, 1996.

Michaud's procedural arguments challenging removal to this court are not timely. However, a litigant may raise the issue of whether the court has subject matter jurisdiction at any time. The statute directs the district court to remand the case back to the state court if it appears at *any time* before final judgment that the federal court lacks subject matter jurisdiction. *Id.* (emphasis added). Upon review of Michaud's arguments, the court concludes for the same reasons explained in its July 5 order that there is proper subject matter jurisdiction in this case based on diversity of citizenship.

Having concluded that the court has jurisdiction over this matter, the court turns to the Magistrate's Findings and Recommendation. This court may dismiss an action under Rules 16(f), 37(b), or 41(b) for failure to comply with court rules or court orders. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 650 (9th Cir. 1991). A [sic] involuntary dismissal may be with or without prejudice. *Johnson v. U.S. Department of the Treasury*, 939 F.2d 820, 825 (9th Cir. 1991). The court should afford the litigant prior notice of its intention to dismiss. *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987), *cert. denied* 488 U.S. 819 (1988). The sanction of dismissal without prejudice is appropriate when a pro se litigant refuses to obey a Magistrate's orders in face of warnings that such conduct could result in dismissal of the case. *See, e.g., Dukes v. New York City Police Com'r Ward*, 129 F.R.D. 478 (S.D.N.Y. 1990).

The court agrees with the Magistrate's conclusion that Michaud failed to articulate a legitimate reason for failing to comply with a court order. The court warned Michaud that failure to comply would result in dismissal of his case. Accordingly, this court ADOPTS the Magistrate's Findings and Recommendation and DISMISSES the case without prejudice.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 15, 1996.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

APPENDIX E

GERALD T. MICHAUD, Sui juris
P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808) 669-0887

In Propria Persona

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH AND MONIQUE CATCOTT; JOHN DOES 1-10; JANE DOES 1-10; PARTNERSHIP DOES 1-10; GOVERNMENTAL ENTITY DOES 1-10, inclusive, Defendants.	CIVIL NO. 95-0844 (1) COMPLAINT; AFFIDAVIT OF GERALD T. MICHAUD; EXHIBITS A-B; DEMAND FOR JURY TRIAL; SUMMONS

COMPLAINT

COMES NOW Plaintiff Gerald T. Michaud, hereinafter "Plaintiff" and for causes of action against Defendants

above named, only, for breach of the duty of good faith and fair dealing, allege and aver as follows:

COUNT I

1. Plaintiff Gerald T. Michaud was at all relevant times herein mentioned, a resident of the County of Maui, State of Hawaii.

2. Defendant STATE FARM INSURANCE COMPANIES (hereinafter STATE FARM) is, and was at all relevant times herein mentioned, upon information and belief, an Illinois corporation authorized to, and doing business in the State of Hawaii including the County of Maui.

3. That the true names or capacities, whether individual, corporate, associate, or otherwise, of Defendants JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10 are sued herein under their fictitious names and identities and are presently unknown to Plaintiff, and their true names, identities, capacities, activities, and/or responsibilities are presently unknown to Plaintiff despite diligent efforts to determine same, but said DOE defendants are in some manner proximately responsible for the events and happenings herein referred to, and legally caused injury and damages proximately thereby to Plaintiff as herein alleged.

4. That at all times herein mentioned, Defendants, and each of them, were the agents and employees of each of the remaining Defendants, and were at all times acting

within the purpose and scope of said agency and employment, and each Defendant has ratified and approved the acts of his agent.

5. Prior to November 2, 1989, Defendant STATE FARM issued to Plaintiff Gerald T. Michaud a No-Fault Automobile insurance Policy No. S12 4235-D23-51A which insured a certain vehicle belong [sic] to Plaintiff. A copy of said Policy is marked as Exhibit "A," attached hereto, and incorporated herein by reference. Said Automobile insurance Policy was entered into by Plaintiff within the jurisdiction of the above-entitled Court and required the payment of benefits within the jurisdiction of the above-entitled Court for a total amount to be shown at the time of trial. The policy extended to plaintiff no-fault benefits which insured a certain vehicle belonging to Plaintiff.

6. Plaintiff has paid all premiums due under said Automobile Insurance Policy to Defendant STATE FARM at all relevant times herein and has performed all obligations under said Automobile Insurance Policy on Plaintiffs' part to be performed.

7. On or about April 29, 1994, while Plaintiff was driving his vehicle southbound in the southbound lane of Piilani Highway, a northbound vehicle crossed over the center lane into the center of the southbound lane and negligently, carelessly and/or recklessly collided with the vehicle driven by Plaintiff. Plaintiff suffered a loss compensable under the terms of said Automobile Insurance Policy in that Plaintiff sustained serious bodily injury.

8. Plaintiffs' accident occurred out of the operation and use of the said vehicle insured by Defendant STATE FARM.

9. On or about May 19, 1994, upon release from Queen's Hospital, Plaintiff filed a claim for insurance benefits under said Automobile Insurance Policy due to Plaintiffs' serious bodily injuries.

10. All acts complained herein occurred within the jurisdiction of the Circuit Court of the Second Circuit, State of Hawaii.

11. As a result of the above-mentioned accident, Plaintiff sustained serious and permanent bodily and psychological injury, loss of income, medical expenses and severe emotional distress and mental suffering.

12. That at the time of the above-referenced accident, the above-described automobile insurance policy issued by Defendant STATE FARM was in full force and effect.

13. In due course, Plaintiff submitted his respective applications for no-fault benefits to Defendant STATE FARM.

14. Despite overwhelming evidence that Plaintiff was entitled to no-fault benefits, Defendant STATE FARM failed and refused to provide the no-fault benefits due to Plaintiff pursuant to Plaintiffs' policy of insurance.

15. Despite Plaintiffs' continued demands for benefits and Plaintiffs' request for information regarding the basis for Defendant STATE FARM'S denial, Defendant STATE FARM continues to refuse to provide no-fault benefits to Plaintiff and refuses to provide Plaintiff with

any factual information, or legitimate documentation supporting or otherwise explaining the denial.

16. In disregard of its duties and obligations to Plaintiff, Defendant STATE FARM, among other things, failed to adequately investigate Plaintiffs' claims for no-fault benefits as is its obligation, consciously and/or negligently disregarded and breached its duties and obligations to provide no-fault benefits to Plaintiff, and took actions which were intended only to financially benefit Defendant STATE FARM.

17. Defendant's actions in denying Plaintiffs claims were done wantonly, oppressively, and with such malice as implies a spirit of mischief or criminal indifference to their civil obligations to Plaintiff, and indicated a conscious indifference to the consequences of their actions, and therefore Defendant STATE FARM has breached its duty of good faith and fair dealing owed to Plaintiff in the following respects:

(a) Failure to make insurance benefit payments to Plaintiff at a time when Defendants knew that Plaintiff was entitled to said payments under the terms of said No-Fault Package Policy.

On or about May 19, 1994, Plaintiff submitted a claim to Defendant STATE FARM for the losses due to the accident. There was a substantial delay in investigating Plaintiffs' claim, as different individuals were assigned to verify "check payments" made by Plaintiff, during which time Plaintiff was unable to receive the proper medical treatment needed for his serious injuries. Thereafter, Defendant STATE FARM refused to pay plaintiff any

benefits to which he was entitled, contending that Plaintiffs' Policy was canceled for non-payment of premium. Plaintiff disputed Defendant STATE FARM'S determination and requested a reconsideration of the denial with the aid of the State of Hawaii, Insurance Division, Department of Commerce and Consumer Affairs, hereinafter DEPARTMENT. Defendant STATE FARM again denied Plaintiffs' claim by furnishing the DEPARTMENT and Plaintiff with falsified documents (copies of said documents are marked as Exhibit "B"), and such denial has continued through the present time;

(b) Delaying payments to Plaintiff knowing Plaintiffs' claim for benefits under said Hawaii No-Fault Automobile Insurance Package Policy to be valid for the reasons stated above;

(c) Misrepresenting to Plaintiff pertinent facts relating to Hawaii no-fault automobile insurance rules pertaining to cancellation procedures, at a time when Defendant knew that such representations were false;

(d) Failure to reasonably and promptly investigate and process Plaintiffs' claim for the reasons stated above;

(e) Not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claim for damage in which liability has become reasonably clear for the reasons stated above;

(f) Failure to provide a reasonable explanation of the basis relied upon in the Hawaii Revised Statutes concerning "cancellation notices," in relation to the applicable facts, for the denial of Plaintiffs' claim for the

reasons stated above, as well as Defendant's language as used in the denials was positively vague and ambiguous and is insufficient to justify refusal to pay the disputed no-fault benefits;

(g) Plaintiff is informed and believes and thereon allege [sic] that Defendant STATE FARM has breached its duty of fair dealing and good faith owed to Plaintiff by other acts or omissions of which Plaintiff is presently unaware. Plaintiff will seek leave of Court to amend this Complaint at such time as Plaintiff discovers the other acts or omissions of said Defendant constituting such breach.

18. Defendants' conduct described herein was intended by the defendants to cause injury to the Plaintiff or was carried on by the defendants with a conscious disregard of the rights of Plaintiff, subjected Plaintiff to cruel and unjust hardship in conscious disregard of Plaintiffs' rights, and was an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendants with the intention to deprive Plaintiff of legal rights or to otherwise cause injury, such as to constitute malice oppression or fraud under Hawaii Revised Statutes § 480-2, thereby entitling Plaintiff to punitive damages in an amount appropriate to punish or set an example of Defendants.

19. Defendants' conduct described herein was undertaken by officers or managing agents of the corporate Defendant, STATE FARM, identified herein as ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10,

AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive, who were managing agents of Defendant, STATE FARM, responsible for claims operations and/or decisions. The aforesaid described conduct of ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and said DOE individuals was therefore undertaken on behalf of the corporate defendant, STATE FARM. Said corporate Defendant further had advance knowledge of the actions and conduct of ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and said DOE individuals whose actions and conduct were ratified, authorized, and approved by corporate officers, directors or managing agents whose precise identities are unknown to Plaintiff at this time and are therefore identified and designated as JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive.

20. Defendant STATE FARM'S actions and omissions as alleged herein were part of Defendant STATE FARM'S company policy and claims practice designed to utilize Defendant STATE FARM'S superior financial strength and/or large insurance market share in order to intimidate the injured victim in his time of need to do without and/or accept less than what is due him, all of which is in disregard of Defendant STATE FARM'S duties and obligations as an insurer to its insured.

21. As a proximate result of the aforementioned wrongful conduct of Defendants, Plaintiff has suffered, and will continue to suffer in the future, damages plus

interest, for a total amount to be shown at the time of trial.

22. As a further proximate result of the aforementioned wrongful conduct of Defendants, Plaintiff has suffered anxiety, worry, mental and emotional distress, and other incidental damages and out-of-pocket expenses, all to Plaintiffs' general damage in an amount to be shown according to proof at the time of trial.

23. The aforestated actions and omissions constitute unfair claim settlement practices as set forth in H.R.S. § 431:13-103(a)(10).

24. The above alleged actions and omissions proximately caused Plaintiff damages for which he seeks general, special, consequential, compensatory, treble, and punitive damages as set forth below.

COUNT II

25. Plaintiff reallege [sic] the allegations contained in Paragraphs 1 through 24 above and incorporate same by reference as though fully set forth herein.

26. Defendant STATE FARM'S wrongful failure to provide no-fault benefits constitutes an express and/or implied breach of insurance contract for which plaintiff seeks damages as herein set forth.

COUNT III

27. Plaintiff reallege [sic] the allegations contained in Paragraphs 1-26 above and incorporate same by reference as though fully set forth herein.

28. The aforesaid acts and omissions of said Defendants constitute negligent claims practices for which Plaintiff seeks damages as herein set forth.

COUNT IV

29. Plaintiff reallege [sic] the allegations contained in Paragraphs 1-28 above and incorporate same by reference as though fully set forth herein.

30. Defendants ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSPS [sic] 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive, and each of them, are employees and agents of Defendant STATE FARM who were responsible for processing Plaintiffs' claim for benefits under the No-Fault Automobile Insurance Package Policy which is the subject matter of this action, and Defendant STATE FARM authorized, directed and ratified the acts of said Defendant employees and agents herein.

31. Defendants ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive, and each of them, as individuals and entities engaged in the business of insurance in Hawaii, are, and at all times herein mentioned were, members of the class of persons and entities intended to be regulated and in fact regulated by Hawaii Insurance Code sections 431:13-102, and 431:13-103.

32. Plaintiff, as an insured under a No-Fault Automobile Insurance Package Policy with Defendant STATE FARM, is, and at all times herein mentioned was, a member of the class of persons sought to be protected by *Hawaii Insurance Code* sections 431:13-102, and 431:13-103.

33. By the aforesaid acts and omissions as alleged herein, Defendants, and each of them, have violated their statutory duties set forth in *Hawaii Insurance Code* sections 431:13-103 in the following particulars:

Committing or performing with such frequency as to indicate a general business practice any of the following:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue [Ins. Code § 431:13-103(10)(A)];

(b) Failing to acknowledge and act reasonably promptly upon communications from Plaintiff with respect to the claim arising under said No-Fault Automobile Insurance Package Policy [Ins. Code § 431:13-103(10)(B)(iii)];

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims such as Plaintiffs' herein arising under said No-Fault Automobile Insurance Package Policy [Ins. Code § 431:13-103(10)(C)];

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information such as Plaintiffs' herein arising under said No-Fault Automobile Insurance Package Policy [Ins. Code § 431:13-103(10)(D)];

(e) Failing to affirm or deny Plaintiffs' coverage of claims within a reasonable time after proof of

loss statements have been completed, [Ins. Code § 431:13-103(10)(E)];

(f) Failing to provide the insured, such as Plaintiff, or when applicable the insured's beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty calendar days from the date it was reported [Ins. Code § 431:13-103(10)(G)];

(g) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of Plaintiffs' claims in which liability has become reasonably clear [Ins. Code § 431:13-103(10)(H)];

(h) Compelling Plaintiff to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds [Ins. Code § 431:13-103(10)(1)];

(i) Attempting to settle Plaintiffs' claim for less than the amount to which a reasonable person, would have believed the Plaintiff was entitled by reference to written or printed advertising material accompanying or made part of an application given Plaintiff [Ins. Code § 431 :13-103(10)(J)];

(j) Attempting to settle Plaintiffs' claims on the basis of an application which was altered without notice, or knowledge or consent of the Plaintiff [Ins. Code § 431:13-103(10)(K)];

(k) Failing to promptly provide a reasonable explanation of the basis relied on in the No-Fault Automobile Insurance Package Policy, in relation to the

applicable facts and law, for the denial of Plaintiffs' claim [Ins. Code § 431:13-103(10)(P)].

34. As a proximate result of the Defendants' breach of their statutory duties as herein alleged, Plaintiff has suffered damages under the terms of the No-Fault Automobile Insurance Package Policy involved herein, plus interest, and for anxiety, worry, mental and emotional distress, and other incidental damages as alleged herein.

35. Defendants' conduct described herein was intended by the Defendants to cause injury to the Plaintiff or was carried on by the Defendants with a conscious disregard of the rights of Plaintiff, subjected Plaintiff to cruel and unjust hardship in conscious disregard of Plaintiffs' rights, and was an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendants with the intention to deprive Plaintiff of property, legal rights or to otherwise cause injury, such as to constitute malice oppression or fraud under Hawaii Revised Statutes § 480-2, thereby entitling Plaintiff to punitive damages in an amount appropriate to punish or set an example of Defendants.

36. Defendants' conduct described herein was undertaken by officers or managing agents of the corporate Defendant, STATE FARM, identified herein as ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREDIA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive, who were managing agents of Defendant, STATE FARM, responsible for claims operations and/or decisions. The

aforedescribed conduct of ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and said DOE individuals was therefore undertaken on behalf of the corporate Defendant, STATE FARM. Said corporate Defendant further had advance knowledge of the actions and conduct of ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH, MONIQUE CATCOTT, and said DOE individuals whose actions and conduct were ratified, authorized, and approved by corporate officers, directors or managing agents whose precise identities are unknown to plaintiff at this time and are therefore identified and designated herein as JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10, inclusive.

37. Defendant STATE FARM breached the implied and/or expressed covenant of good faith and fair dealing and willfully and/or wantonly and/or intentionally and/or in bad faith breached the insurance contract for which Plaintiff seeks damages as herein set forth.

COUNT V

38. Plaintiff reallege the allegations contained in Paragraphs 1-37 above and incorporate same by reference as though fully set forth herein.

39. The aforesaid acts and omissions of said Defendant STATE FARM constitutes the tort of Bad Faith for which Plaintiff seeks damages as herein set forth.

COUNT VI

40. Plaintiff reallege the allegations contained in Paragraphs 1-39 above and incorporate same by reference as though fully set forth herein.

41. The aforesaid acts and omissions of Defendant STATE FARM were unlawful, unfair, and deceptive and thus violative of Hawaii Revised Statutes § 480-2 for which Plaintiff seeks damages as provided by Hawaii Revised Statutes § 480-13.

COUNT VII

42. Plaintiff reallege the allegations contained in Paragraphs 1-41 above and incorporate same by reference as though fully set forth herein.

43. The aforesaid acts and omissions of Defendant STATE FARM constitute outrageous tortious conduct for which Plaintiff seeks damages as herein set forth.

COUNT VIII

44. Plaintiff reallege the allegations contained in Paragraphs 1-43 above and incorporate same by reference as though fully set forth herein.

45. The aforesaid acts and omissions of Defendant STATE FARM constitutes the intentional and/or negligent infliction of emotional distress for which Plaintiff seeks damages as herein set forth.

COUNT IX

46. Plaintiff reallege the allegations contained in Paragraphs 1-45 above and incorporate same by reference as though fully set forth herein.

47. The aforestated conduct and omissions of Defendant STATE FARM constitute intentional and/or negligent misrepresentation for which Plaintiff seeks damages as herein set forth.

COUNT X

48. Plaintiff reallege the allegations contained in Paragraphs 1-47 above and incorporate same by reference as though fully set forth herein.

49. The aforesaid acts and omissions of Defendant STATE FARM were done willful, wanton and/or grossly reckless and negligent in manner totally disregarding the interests and rights of Plaintiff, and Defendant STATE FARM is therefore liable to Plaintiff for punitive damages in an amount to be shown at trial.

WHEREFORE, upon a hearing hereof, Plaintiff prays that judgment be entered in his favor, and against said Defendants, and each of them, as follows:

1. Damages for failure to provide benefits under the no-fault Automobile Insurance Package Policy in an amount to be determined at the time of trial plus pre and post-judgment interest;

2. General damages for mental and emotional distress and special, consequential, compensatory, and treble damages in amounts to be shown at trial;

3. Punitive and exemplary damages in an amount appropriate to punish or set an example of Defendants;

4. For costs of suit incurred herein; and,

5. For such other and further relief as to which the Court deems just and proper, and to which Plaintiff shall be entitled pursuant to Rule 54 (c) of the *Hawaii Rules of Civil Procedure*.

DATED: Wailuku, Maui, Hawaii November 7, 1995.

/s/ Gerald T. Michaud
Gerald T. Michaud,
Appearing In Propria Persona

APPENDIX F

McCORRISTON MIHO MILLER MUKAI

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Attorneys for Defendants
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ROBERT YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH AND MONIQUE CATCOTT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ROBERT YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH AND MONIQUE CATCOTT; JOHN DOES 1-10; JANE DOES 1-10; PARTNERSHIP DOES 1-10; GOVERNMENTAL ENTITY DOES 1-10, inclusive, Defendants.	CIVIL NO. 96-00155 SPK DEFENDANTS' NOTICE OF REMOVAL; VERIFICATION; EXHIBIT "A"; CERTIFICATE OF SERVICE

DEFENDANTS' NOTICE OF REMOVAL

TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

1. This Notice of Removal is made pursuant to 28 U.S.C. §§ 1441 and 1446.

2. Defendant STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("STATE FARM"), Movant herein, is and was at all times relevant hereto, including without limitation the date on which Plaintiff filed the instant Complaint, a Company organized and existing under the laws of the State of Illinois, with its principal place of business in Bloomington, Illinois.

3. Upon information and belief, Plaintiff Gerald T. Michaud ("Plaintiff") is and was at all times relevant hereto, including without limitation the date on which Plaintiff filed the instant Complaint and the date on which this Notice of Removal is filed, a citizen of the State of Hawaii.

4. On or about November 7, 1995, Plaintiff filed a Complaint in Civil No. 95-0844(1) in the Circuit Court of the Second Circuit, State of Hawaii, against Defendants claiming, *inter alia*, that Defendants tortiously and in bad faith breached an insurance contract with Plaintiff.

5. Upon information and belief, the Complaint was mailed to a State Farm office in Westlake, California on November 9, 1995, and was received on November 13, 1995.

6. On or about November 30, 1995, Defendants filed an Answer to Plaintiffs' Complaint in the Circuit Court of the Second Circuit, State of Hawaii.

7. On January 17, 1996, Defendants State Farm Mutual Automobile Insurance Company, Robert Yoshino, Scott A. Gilmore, Karen Perreira, Frances Yost, A. Don Smith, and Monique Catcott filed a Motion to Dismiss Complaint against Robert Yoshino, Scott A. Gilmore, Karen Perreira, Frances Yost, A. Don Smith, and Monique Catcott with Prejudice ("Motion to Dismiss Individual Defendants").

8. The Motion to Dismiss Individual Defendants was heard on February 13, 1996 before the Honorable E. John McConnell, Judge of the Second Circuit Court, State of Hawaii. After considering the submissions and oral argument, Judge McConnell *granted* Defendants' Motion to Dismiss with Prejudice, finding that Plaintiff's Complaint failed to state a cause of action against individual Defendants Robert Yoshino, Scott A. Gilmore, Karen Perreira, Frances Yost, A. Don Smith, and Monique Catcott.

9. Judge McConnell's decision confirmed that individual Defendants Robert Yoshino, Scott A. Gilmore, Karen Perreira, Frances Yost, A. Don Smith, and Monique Catcott were improperly joined with State Farm as Defendants in Civil No. 950844(1). See *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

10. There is original jurisdiction in the United States District Court for the District of Hawaii under 28 U.S.C. § 1332 (diversity of citizenship) because fraudulently joined defendants, as defined in *McCabe v. General Foods*, supra, do not destroy diversity jurisdiction.

11. As set forth in the Complaint, Plaintiff seeks damages for general, special, consequential, compensatory, treble, and punitive damages, as well as attorneys

fees, costs, and pre- and post-judgment interest. Therefore, based on the amount and type of damages sought, the attorneys' fees involved, and the insurance benefits at issue, the amount in controversy exceeds $50,000.

12. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of the process, pleadings, and orders served upon Defendants in the Circuit Court of the Second Circuit, State of Hawaii, are appended hereto as Exhibit "A". Pursuant to 28 U.S.C. § 1447(b), Movant is prepared to file with the Clerk of the United States District Court for the District of Hawaii copies of all records and proceedings from the State court action.

WHEREFORE, Movant prays that the above-entitled action be removed from the Circuit Court of the Second Circuit, State of Hawaii, to the United States District Court for the District of Hawaii.

DATED: Honolulu, Hawaii, February 15, 1996.

/s/ Douglas K. Ushijima
RICHARD B. MILLER
LISA M. GINOZA
DOUGLAS K. USHIJIMA
Attorneys for Defendants

APPENDIX G

GERALD T. MICHAUD, Sui juris
P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808)669-0887

In Propia Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH AND MONIQUE CATCOTT; JOHN DOES 1-10; JANE DOES 1-10; PARTNERSHIP DOES 1-10; GOVERNMENTAL ENTITY DOES 1-10, inclusive, Defendants.	CIVIL NO. 96-00155 SPK PLAINTIFF GERALD T. MICHAUD'S NOTICE NOT TO CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE; EXHIBIT A; AFFIDAVIT OF GERALD T. MICHAUD

PLAINTIFF GERALD T. MICHAUD'S NOTICE NOT TO CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

TO: THE UNITED STATES DISTRICT COURT CLERK FOR THE DISTRICT OF HAWAII.

PLEASE TAKE NOTICE that Plaintiff Gerald T. Michaud does not waive any rights, nor consents to proceed

before a United States District Court for the District of Hawaii.

DATED: Lahaina, Hawaii, March 12, 1996.

/s/ Gerald T. Michaud
Gerald T. Michaud, Plaintiff

APPENDIX H

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM INSURANCE COMPANIES, et al., Defendants.	) CIVIL NO. 96-0155 SPK) ORDER TO SHOW CAUSE

ORDER TO SHOW CAUSE

On February 15, 1996, State Farm Insurance Companies et al. ("Defendants") removed this case from the Second Circuit Court, State of Hawaii. Pursuant to Rule 16(a) of the Federal Rules of Civil Procedure, a pretrial conference was set for May 13, 1996 at 8:30 a.m. Plaintiff failed to appear and failed to file a meeting of the parties statement as required by Local Rule 230-1(d).

IT IS HEREBY ORDERED that Plaintiff appear on June 4, 1996 at 9:00 a.m. to show cause, if any there be, why sanctions should not be imposed for failure to file a meeting of the parties statement and failure to appear. Plaintiff is warned that failure to respond will result in a dismissal of the case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 15, 1996.

/s/ Francis I. Yamashita
Francis I. Yamashita

United States Magistrate
Judge

APPENDIX I

Gerald T. Michaud, Sui juris
P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808) 669-0887

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD Plaintiff, vs. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive, Defendants.	CIVIL NO. 96-00155 SPK PLAINTIFF GERALD T. MICHAUD'S RESPONSE TO ORDER TO SHOW CAUSE; MEMORANDUM; AFFIDAVIT OF GERALD T. MICHAUD; CERTIFICATE OF SERVICE DATE: June 4, 1996 TIME: 9:00 a.m. JUDGE: Francis I. Yamashita

PLAINTIFF GERALD T. MICHAUD'S RESPONSE TO ORDER TO SHOW CAUSE

WITH ALL DUE RESPECT, Plaintiff Gerald T. Michaud is returning this Honorable Court's Order to Show

Cause WITHOUT DISHONOR. Plaintiff refutes the validity of Defendant State Farm Insurance Companies, et al ("State Farm") authority to Remove the above entitled suit. Plaintiff's only Remedy at Law regarding the aforementioned suit is found in the Uniform Commercial Code ("UCC"). Pursuant to UCC § 3-505, I demand that State Farm provide Plaintiff, and this Honorable Court the following information:

(a) *Reasonable identification* of the person(s) who has/have made said Removal determinations, including copies of the following:

(1) His/Her/Their Driver's License

(2) His/Her/Their Social Security Card

(3) His/Her/Their State Farm Identification Card

(b) *Exhibition of the instrument*, or agreement of Removal which Plaintiff knowingly, voluntarily and intentionally entered into with State Farm, which created the alleged liability contained in the above referenced presentment determinations of Order to Show Cause.

(c) State Farm's *"Implementing authority"* Granting State Farm the Power to Remove such suits ex parse. If State Farm is conducting this Removal for another; please include the names and titles of person(s) delegating State Farm such authority, back to the initial "Removal Order" issued by which Court. Also include any authority, within the law, that defines me as the "person" liable for not conforming to such an Order to Show Cause.

Plaintiff also requests that this Honorable Court mandate that Sate [sic] Farm produce the original Consent signed

by me under which this Court compels performance UCC § 1-203(3).

This Honorable Court is in possession of incomplete instruments UCC § 3-115. These alleged Removal documents do not Evidence;

1) The statute and *"implementing regulation"* for the aforesaid action,

2) Nor has this Honorable Court Evidence that it is a Holder in Due Course UCC § 3302, providing the statute and *"implementing regulation"* which gives this Court authority to send the above noted Order to Show Cause.

Therefore, this Honorable Court's Presentment is being returned by Plaintiff (with all due respect) Without Dishonor, since this Court has sent incomplete instruments UCC § 3-115 with which State Farm is trying to induce the above, by Fraud UCC § 3-305(2)(B) & (C) causing a violation.

State Farm's on going Failure to provide me, and this Court with the above requisites invalidates the Removal, and/or Order to Show Cause that this Honorable Court has made and/or *(word is unreadable)* UCC § 1-505(2).

State Farm, and this Honorable Court knew or should have known that there is no immunity for anybody when they deal in commercial paper under the Eric and Clearfield Doctrine, see F.R.C.P. Evidence 902 paragraph 9, but not limited to.

DATED: Lahaina, Hawaii, May 22, 1996.

Respectfully Submitted With Explicit Reservation of All Rights Without Prejudice U.C.C. § 1-207

/s/ Gerald T. Michaud
Gerald T. Michaud

PLEASE TAKE SPECIAL NOTICE

Your Honor, my use of (Without Prejudice U.C.C. 1-207) above my signature on this document indicates that I have exercised the "REMEDY" provided for me in the Uniform Commercial Code at Article L Section 207, whereby I might reserve my Common Law Right not to be bound by, nor compelled to perform under any contract, commercial agreement or bankruptcy that I have not entered into *KNOWINGLY, VOLUNTARILY,* and *INTENTIONALLY.* That reservation serves *NOTICE* upon all of the Administrative Agencies of government *NATIONAL, STATE & LOCAL,* that I do not, and will not accept the liability associated with the *"COMPELLED BENEFIT"* of any unrevealed contract, commercial agreement or bankruptcy. And that;

"An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it."

Guardian T & D Co. vs. Fisher 26 S. Ct. 186 at 188

"Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained

that he who purports to act for the government stays within the bounds of his authority." *Federal Crop Insurance vs. Merrill* 332 US 380 at 384

"If the doctrine of "stare decisis" has any meaning at all, it requires that the people in their everyday affairs be able to rely on our decisions, and not be needlessly penalized for such reliance." *US vs. Mason* 412 US 391 (1973)

"Because of what appears to be a lawful command on the surface, many citizens, because of their respect for what only appears to be the law, are cunningly coerced into waiving their rights, due to ignorance." *U.S. vs. Minker* 350 U.S. 179 at 187

"Illegitimate and Unconstitutional practices get their first footing . . . by silent approaches and slight deviations from otherwise legal modes of procedure." *Boyd vs. United States* 116 US 616 at 635.

APPENDIX J

GERALD T. MICHAUD, Sui juris
P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808) 669-0887

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10 inclusive; GOVERNMENTAL ENTITY DOES, 1-10 inclusive, Defendants.	) CIVIL NO. 96-00155 SPK) PLAINTIFF GERALD T. MICHAUD'S DEMAND FOR PROOF OF JURISDICTION; CERTIFICATE OF SERVICE) DATE: June 4, 1996) TIME: 9:00 a.m.) JUDGE: Francis I. Yamashita

PLAINTIFF GERALD T. MICHAUD'S
DEMAND FOR PROOF OF JURISDICTION

COMES NOW Plaintiff Gerald T. Michaud (Plaintiff) averring that; On March 12, 1996, Plaintiff filed in the

above entitled court a Response to Defendant's Notice of Filing Notice of Removal, whereas Plaintiff made known that this Honorable Court does not have jurisdiction in respect to this instant matter. On March 14, 1996 Plaintiff filed in the above entitled court a Notice not to Consent to Proceed Before a United States Magistrate as per the voluntary Rule. That on March 19, 1996 Plaintiff's Response Notice was filed in the Circuit Court of the Second Circuit in the State of Hawaii. On April 24, 1996 Plaintiff filed a Scheduling Conference Statement within the above entitled court again challenging jurisdiction. On May 13, 1996 Plaintiff filed a Response in the above entitled court in regard to Defendant's Scheduling Conference Statement, whereas Plaintiff challenged jurisdiction once again. On May 15, 1996 the above entitled court dishonored all of Plaintiff's jurisdictional challenges, and Ordered Plaintiff to Show Cause, and to appear on April 4, 1996. With the threat of Dismissing this suit, remiss the jurisdictional issue previously raised, Plaintiff forthwith mailed a Response to the Order to Show Cause on May 22, 1996. This Honorable Court through negligence per se is attempting to coerce Plaintiff into its foreign jurisdiction.

Plaintiff avers that he has studied the law, and does not believe that he is a person under the jurisdiction of this Honorable Court, which is defined and limited by Article I § 8 Clause 17, and Amendment 11 § 1 of the Constitution for the United States of America. Plaintiff contends that:

> "It is a well established principle of law that all federal legislation applies only within the territorial Jurisdiction of the United States unless

> contrary intent appears." *Foley Brothers v. Filardo*, 336, U.S. 281 (1948)

It is a principle of law that, once challenged, the person asserting jurisdiction must prove that jurisdiction to exist as a matter of law: *Title 5 of the U.S. Codes* § 556 (d) states as follows:

> "When jurisdiction is challenged the burden of proof is on the government."

Also: Please take notice of the following cases:

McNutt v. G.M., 56 S. Ct. 789, 80 L. Ed. 1135

Griffin v. Matthews, 310 Supp. 341, 423, F. 2d 272

Basso v. U.P.L., 495 F. 2d 906

Thomson v. Gaskiel, 62 S. Ct. 673, 83 L. Ed. 111.

Your jurisdiction over Plaintiff is hereby challenged on the basis of the following Affidavit of Facts:

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

Plaintiff Gerald T. Michaud, being first duly sworn upon oath, deposes and states that:

(1) I am the individual Demanding Proof of Jurisdiction;

(2) I have personal knowledge of the facts as contained in this Demand, and Affidavit unless said facts are alleged upon information and belief, and in those instances I believe said facts to be true;

(3) I am a natural born Preamble Citizen of the Connecticut Republic. This is one of the 50

Republic sovereign states, and not a Territory over which the sovereignty of the United States extends;

(4) I am domiciled in the sovereign Hawai'i Republic. I do not reside in any Territory, Possession, Instrumentality or Enclave which is under the sovereignty of or subject to the jurisdiction of the United States;

(5) I am not a citizen of the United States (District of Columbia, Article I § 8 Clause 17 U.S. Const.) subject to its jurisdiction;

(6) I am not a federal government employee nor am I a corporation.

If this Honorable Court feels that it has jurisdiction over Plaintiff, please provide Plaintiff with the appropriate jurisdictional authority. If this Honorable Court cannot provide such authority, Plaintiff will respectfully expect an Order Remanding the instant matter back into the Circuit Court of the Second Circuit for the State of Hawaii where it by law rightfully belongs.

Further AFFIANT SAYETH naught.

DATED: Lahaina, Maui, Hawaii, May 24, 1996.

/s/ Gerald T. Michaud
Gerald T. Michaud, Plaintiff-Affiant

Subscribed and sworn to before
me this 24 day of May, 1996.

/s/ Marilyn Maulin
Notary Public, State of Hawaii

My commission expires: 6/29/96

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	CIVIL NO. 96-0155 SPK ORDER DENYING PLAINTIFF'S DEMAND FOR PROOF OF JURISDICTION

Pursuant to Local Rule 220-2, the Court finds this matter suitable for disposition without hearing. After reviewing the motion, and other pleadings, the Court reads Plaintiff's Demand for Proof of Jurisdiction as a motion to remand for lack of subject matter jurisdiction which this court DENIES.

On November 7, 1995, Plaintiff Gerald L. Michaud, pro se, ("Plaintiff") filed a complaint in the Circuit Court of the Second Circuit, State of Hawaii, claiming that Defendants breached their insurance contract with Plaintiff in bad faith. Defendants filed their Answer on November 30, 1995.

Defendants later moved to dismiss the complaint against Defendants Robert Yoshino, Scott A. Gilmore, Karen Perreira, Frances Yost, A. Don Smith, and Monique Catcott with Prejudice. Judge E. John McConnell, Judge of the Second Circuit Court, State of Hawaii, granted the motion and found that Plaintiff's Complaint failed to

state a cause of action against the above-named individual Defendants. The only remaining Defendant was State Farm.

Defendants filed their Notice of Removal on February 15, 1996, claiming original jurisdiction under diversity of citizenship. 28 U.S.C. § 1332. On May 28, 1996, Plaintiff filed a "Demand for Proof of Jurisdiction" in which he claims that this court lacks jurisdiction. The court interprets this as a Motion to Remand for Lack of Subject Matter Jurisdiction. Defendant removed this action from state court, pursuant to 28 U.S.C. § 1441. Defendant, in its petition for removal, stated that this court has jurisdiction based on diversity of citizenship in that the parties are citizens of different states and the amount in controversy exceeds $50,000. 28 U.S.C. § 1332.

There is no dispute that Defendant is an Illinois corporation, authorized to do business in Hawaii. Upon reviewing the complaint in this action, however, it is unclear what amount of damages Plaintiff is claiming. In diversity cases, where the amount in controversy is in doubt, the Supreme Court has drawn a sharp distinction between original jurisdiction and removal jurisdiction:

> There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end.

Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992), citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938).

In a case where the amount in controversy was not made clear by the plaintiff, the defendant "bears the

burden of actually proving the facts to support jurisdiction, including the jurisdictional amount." *Gaus* at 566-67. It is not sufficient for the defendant to simply allege that "the matter in current controversy . . . exceeds the sum of $50,000." *Id.* at 567. The defendant has the burden of setting forth, in the removal petition, the underlying facts supporting its assertion that the amount in controversy exceeds $50,000. *Id.*

Defendant has met its burden by submitting the Declaration of Yvonne Saronitman, Claims Superintendent and custodian of records for Defendant State Farm. She attaches as an exhibit to her Declaration, a notarized certificate of coverages for Plaintiff's policy with Defendant. The certificate indicates that the coverages and limits for Plaintiff's policy (which is at issue in this action) well exceed $50,000. Therefore, Defendant has confirmed that the amount in controversy requirement has been met.

Because this court has original jurisdiction under diversity of citizenship, Defendant properly removed the action to this court. 28 U.S.C. §§ 1332 and 1441. Plaintiff's Demand for Proof of Jurisdiction is therefore DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 5, 1996.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

MICHAUD v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; CV. NO. 96-00155 SPK; ORDER DENYING PLAINTIFF'S DEMAND FOR PROOF OF JURISDICTION

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	CIVIL NO. 96-01155 SPK FINDINGS AND RECOMMENDATION

FINDINGS AND RECOMMENDATION

On February 15, 1996, State Farm Insurance Companies, et al. ("Defendants") removed this case from the Second Circuit Court, State of Hawaii. Pursuant to Rule 16(a) of the Federal Rules of Civil Procedure, a pretrial conference was set for May 13, 1996 at 8:30 a.m. Plaintiff failed to appear and failed to file a meeting of the parties statement as required by Local Rule 230-l(d). On May 15, 1996, Plaintiff was ordered to appear on June 4, 1996 at 9:00 a.m. to show cause, if any there be, why sanctions should not be imposed for failure to file a meeting of the parties statement and for failure to appear. Plaintiff was warned that failure to respond would result in a dismissal of the case.

On April 24, 1996, this court was copied with a letter from Plaintiff to Defendant. Plaintiff stated in his letter that he would not participate in a conference with Defendant until the issue of the "alleged fraud" gets resolved.

On May 23, 1996, Plaintiff filed a response to this court's order to show cause. In his response, Plaintiff states that he "refutes the validity of Defendant's authority to remove this suit from state court." On June 4, 1996, Plaintiff failed to appear at the order to show cause hearing. To date, this court has not been able to issue a trial schedule in this case due to Plaintiff's failure to participate in a Rule 16 scheduling conference.

DISCUSSION

Accordingly, on May 15, 1996, Plaintiff was ordered to show cause, if any there be, why sanctions should not be imposed failure to file a report of the parties planned meeting and for failure to appear. Plaintiff was warned in the order that failure to respond may result in the dismissal of the case. To date, Plaintiff has not provided this court with an adequate response to the order to show cause and Plaintiff failed to appear for the order to show cause hearing.

Failure to comply with court orders is not taken lightly. Federal Rules of Civil Procedure 16(f) provides, in pertinent part:

> If a party or party's attorney fails to obey a scheduling or pretrial order, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Rule 37(b)(2)(C) provides that if a party fails to obey a court order, the court may "dismiss[ ] the action or proceeding or any part thereof." Fed. R. Civ. P. 37(b)(2)(C).

Plaintiff failed to comply with the order to show cause filed on June 19, 1996. This court finds that Plaintiff's response to the order to show cause dated May 23, 1996 is inadequate. Plaintiff's response fails to articulate a legitimate reason for not complying with court orders. In his response, Plaintiff states that he "refutes the validity of Defendant's authority to remove this suit from state court." This court notes that the Honorable Samuel P. King on July 5, 1996, held that his court has original jurisdiction under diversity of citizenship, thus, Defendants have properly removed this action to this court. Nevertheless, this court finds that whether Plaintiff agreed with the removal or not, he still had an obligation to comply with the Federal Rules of Civil Procedure and the Local Rules for this district. Plaintiff's failure to appear at that the order to show cause hearing is inexcusable. Plaintiff was ordered to appear and was warned that failure to do so would result in a dismissal of his case.

Accordingly, this court RECOMMENDS that Plaintiffs' complaint be dismissed without prejudice for failure to obey a court order.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, September 3, 1996.

/s/ Francis I. Yamashita
Francis I. Yamashita
United State Magistrate Judge

MICHAUD V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.; CIVIL NO. 96-00155 SPK; FINDINGS AND RECOMMENDATION

APPENDIX M

Gerald T. Michaud, Sui juris
P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808) 669-0887
Citizen In Party

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD Citizen In Party, Plaintiff, vs. STATE FARM INSURANCE COMPANIES; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; ET AL, Defendants.	) CIVIL NO. 96 00155 SPK) (Non-Motor Vehicle Tort)) PURSUANT TO F.R.C.P. RULE 38(a) MOTION: UNDER THE JURISDICTION OF THE AMERICAN FLAG OF PEACE [TITLE 4 U.S.C. § 1] OF THE UNITED STATES OF AMERICA. NO JURISDICTION OF ADMIRALTY OR MARITIME WILL BE ALLOWED IN THE JURISDICTION OF THIS CASE – PURSUANT TO ARMY REG. 840-10 CHAPTER 2-1(a)(b); CERTIFICATE OF SERVICE) INCORPORATED CASE NO. 96-00155 SPK

NOTICE OF REFUSAL

Plaintiff Swears to tell the truth and has first hand knowledge of the facts.

ABBREVIATIONS

F.R.C.P.	=	Federal Rules of Civil Procedures
A.U.S.C.	=	Amendment United States Constitution
A.H. S. C.	=	Article Hawaii State Constitution
U.C.C.	=	Uniform Commercial Code
U.S.C.	=	United States Codes
U.S.C.A.	=	United States Codes Annotated
H.R.S.	=	Hawaii Revised Statutes
INC. CASE NO.	=	Incorporation Case Number

Title 18 Chapter 79 U.S.C.A. 1621 = "Perjury of Oath of Office." Person is replaced in all statue definitions by Citizen In Party

RESPONSE

1. Plaintiff is REFUSING the brief titled: "DEFENDANTS STATE FARM INSURANCE COMPANIES, ROBERT (BOB) YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH and MONIQUE CATCOTT'S ANSWER TO THE COMPLAINT FILED NOVEMBER 7, 1995."

2. Plaintiff is REFUSING the brief titled: "DEFENDANTS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ROBERT YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH and MONIQUE CATCOTT'S MOTION TO DISMISS COMPLAINT AGAINST ROBERT YOSHINO,

SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH and MONIQUE CATCOTT WITH PREJUDICE" FILED ON JANUARY 17, 1996.

3. Plaintiff is REFUSING the brief titled: "DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AGAINST ROBERT YOSHINO, SCOTT A. GILMORE, KAREN PERREIRA, FRANCES YOST, A. DON SMITH and MONIQUE CATCOTT WITH PREJUDICE" FILED ON FEBRUARY 12, 1996

4. Plaintiff is REFUSING the brief titled: "DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF GERALD T. MICHAUD'S (1) MOTION TO INTERVENE, (2) MOTION FOR A STAY, AND (3) MOTION FOR A RULING FILED ON MARCH 18, 1996.

5. Plaintiff is REFUSING the ORDER titled: ORDER DENYING PLAINTIFF GERALD T. MICHAUD'S (1) MOTION TO INTERVENE, (2) MOTION FOR A STAY, AND (3) MOTION FOR A RULING" FILED ON APRIL 1, 1996.

6. Plaintiff is REFUSING the NOTICE titled: "NOTICE OF ENTRY OF ORDER" FILED ON APRIL 4, 1996.

7. Plaintiff is REFUSING the NOTICE titled: "NOTICE OF REMOVAL" FILED ON FEBRUARY 15, 1996.

8. Plaintiff is REFUSING the NOTICE titled: "DEFENDANTS' NOTICE OF FILING NOTICE OF REMOVAL" FILED ON FEBRUARY 20, 1996.

9. Plaintiff is REFUSING the ORDER titled: "ORDER SETTING RULE 16 SCHEDULING CONFERENCE" FILED ON FEBRUARY 15, 1996.

10. Plaintiff is REFUSING the BRIEF titled: "DEFENDANT'S SCHEDULING CONFERENCE STATEMENT" FILED ON MAY 6, 1996.

11. Plaintiff is REFUSING the ORDER titled: "ORDER TO SHOW CAUSE" FILED ON MAY 15, 1996.

12. Plaintiff is REFUSING the BRIEF titled: "STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MEMORANDUM IN RESPONSE TO PLAINTIFF GERALD F. MICHAUD'S DEMAND FOR PROOF OF JURISDICTION" FILED ON JUNE 14, 1996.

13. Plaintiff is REFUSING the BRIEF titled: "SUBMISSION OF DECLARATION OF YVONNE SARONITMAN" FILED ON JUNE 18, 1996.

14. Plaintiff is REFUSING the ORDER titled: "ORDER DENYING PLAINTIFF'S DEMAND FOR PROOF OF JURISDICTION" FILED ON JULY 5, 1996.

15. Plaintiff is REFUSING the BRIEF titled: "FINDINGS AND RECOMMENDATION" FILED ON SEPTEMBER 3, 1996.

16. Plaintiffs refusing the briefs titled above (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14) & (15) pursuant to Title 42 U.S.C. 1986 for knowledge and neglect under (F.R.C.P. 9(b)) "FRAUD", (once a fraud always a fraud), (F.R.C.P. 10(a)) "NAME OF PARTY", Note (Plaintiffs not a dead party), and (F.R.C.P. 12(b)(6)) DEFENDANT'S fail to state a claim, (F.R.C.P. 12(b)(7)) fails to join with COMMON LAW (7th A.U.S.C.) pursuant to F.R.C.P. Rule 38(a).

17. Plaintiffs REFUSING FOR "FRAUD" (F.R.C.P. 9(b)) the term of "Pro Se", "Pro Per" or "In Propria Persona."

Plaintiffs not an attorney. Plaintiffs not acting as an attorney.

18. Plaintiffs a "Citizen In Party" and the Movant.

19. The DEFENDANT JUDGE and the DEFENDANT ATTORNEYS in the above Action, have caused the Plaintiff, with the "KNOWLEDGE OF THE LAW" under (Title 42 U.S.C.A. 1986) with a "DEPRIVATION" of U.S. Constitutional Rights under the "COLOR OF LAW", in and for, (Title 18 U.S.C.A. § 242) "DEPRIVATION OF RIGHTS" with "INTENT", and "EXTORTION" of U.S. Constitutional Rights under (Title 18 U.S.C.A. § 872), and (Title 18 U.S.C.A. § 241) "CONSPIRACY AGAINST RIGHTS". DEFENDANTS titled above together in their "SILENCE " causing "NEGLECT" (Title 42 U.S.C. § 1986), while witnessing each other in turn, while at trial, as against the Plaintiff in violation F.R.C.P. 38(a) of a guaranteed (7th A.U.S.C.) common law trial, causing (5th A.U.S.C.) due process.

20. The DEFENDANTS above, under "OATH" as officers of the court, swear an "OATH", to uphold the U.S. Constitution of the United States of America. That "OATH OF OFFICE" is accused by the plaintiff, of "PERJURY" (Title 18 U.S.C.A. § 1621), and "FALSE SWEARING": H.R.S. §§ 710-1060, 710-1062.

21. The court did not have a (Title 4 U.S.C. § 1) American Flag of Peace in the sanctuary of the bar, the same Flag the attorneys and Judge swore an "OATH" and signed an "AFFIRMATION" to certify the authority of the court.

22. The remedy lies in (F.R.C.P. 26(e)(2)) "DISCOVERY" of the law and (Title 42 U.S.C.A. § 1986) for the "KNOWLEDGE" of the law, followed by (F.R.C.P. 9(b)) "FRAUD", then (Title 18 U.S.C.A. § 242) "DEPRIVATION OF RIGHTS UNDER THE COLOR OF LAW": WHOEVER UNDER COLOR OF ANY LAW, STATUTE, ORDINANCE, REGULATION, OR CUSTOM, WILLFULLY SUBJECTS ANY "CITIZEN IN PARTY" IN ANY STATE, TERRITORY, OR DISTRICT TO THE "DEPRIVATION" OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED OR PROTECTED BY THE U.S. CONSTITUTION OR LAWS OF THE UNITED STATES, OR TO DIFFERENT PUNISHMENTS, PAINS, OR BY REASON OF CITIZEN IN PARTY'S COLOR OR RACE THAN ARE PRESCRIBED FOR THE PUNISHMENT OF "CITIZENS IN PARTY", SHALL BE FINED UNDER THIS TITLE OR IMPRISONED NOT MORE THAN TEN YEARS OR BOTH.

23. The "NECESSARY ELEMENT", being the "NEGLECT" of the jurisdiction of the flag (Title 4 U.S.C. § 1) in the sanctuary of the bar. The failure of the court to place an American flag of peace (Title 4 U.S.C. § 1) in the court for the jurisdiction of a common law trial, shall be preserved by the United States Constitution, Hawaii State Constitution (7th A.U.S.C., 1 § 13 A.H.S.C.) and by the (5th A.U.S.C., 1 § 5 A.H.S.C.) "DUE PROCESS OF THE LAW" for a common law "OATH AND AFFIRMATION", that the judges and attorneys are sworn to uphold. This "KNOWLEDGE" of the "DEPRIVATION OF RIGHTS" under the color of law, is the necessary element to "ACCUSE" the officer of the court of "PERJURY OF OATH" of office. The "DEPRIVATION", with intent, by

the officers of the court, as against the Plaintiff, supports the definition of "PERJURY" under (Title 18 Chapter 79 U.S.C.A. § 1621).

24. Plaintiff is the moving "CITIZEN IN PARTY", to the original motion for a jury trial before this court, to this action.

25. The sovereignty that the Plaintiff is declaring is under "THE AMERICAN FLAG OF PEACE" (Title 4 U.S.C. § 1) of "THE UNITED STATES OF AMERICA".

26. If Plaintiff is "FRAUDED" of Plaintiffs rights, under the United States Constitution, Hawaii State Constitution to a (7th A.U.S.C., 1 § 13 A.H.S.C.) common law trial by jury, Plaintiff will proceed forward under (Title 18 U.S.C.A. § 242) "DEPRIVATION" of rights under color of law.

27. The time allowed for trial in federal court is growing near. The Plaintiff now demands declaratory judgment (F.R.C.P. 56) on the original pleadings.

28. (Example): In the same way as a lifeguard sits in his chair and watches as a "WITNESS", the child drown and not stop or correct the "INJURY", that being, the "WITNESS" will cause injury or death. The lifeguard in his official capacity can save the child and will be granted immunity from any complaints of that saving. But let that same lifeguard not do his job, and be a witness, then you have your (Title 42 U.S.C.A. § 1986, and Title 42 § 1983) injury. (Rodney King v. Cal. Highway Patrol). Those officers were found guilty as "WITNESSES" for not stopping or correcting the U.S. Constitutional injury under (Title 42

U.S.C.A. §§ 1986, 1985, & 1983), (Title 18 U.S.C.A. §§ 242, 241, 872, & 1621).

29. (Title 18 U.S.C.A. § 242) Deprivation of Citizens rights under color of law, "POLICY AND CUSTOM" (Title 42 U.S.C.A. § 1983) at notes 319 and 337 explain the "INTENT" to the violation of rights, "BEFORE THE FACTS" and by the court and officer of the court.

30. Plaintiff will not traverse with statements of fraud by the Defendants, or any of the subjects that dealt with the original "FRAUD" or give the fraud credibility. Once a "FRAUD" always a "FRAUD". The Grand Jury will learn of the "FRAUD", how it was constructed, the players, the remedies of law, the war powers act, sovereignty of nations act, use of flags for jurisdiction, and the remedies that our forefathers built into our laws to protect against corruption in government.

31. The question before the people: "IS THE OATH OF OFFICE FOR THE JUDGES AND ATTORNEYS BEING UPHELD?"

32. Plaintiffs prayer for a (7th A.U.S.C., & 1 § 13 A.H.S.C.) common law trial "SHALL BE PRESERVED" and the judges and attorneys swear an "OATH AND AFFIRMATION", to support the United States of America Constitution and the Constitution of the State of Hawaii.

DATED: Lahaina, Hawaii, September 17, 1996.

/s/ Gerald T. Michaud
Gerald T. Michaud,
Citizen In Party, Plaintiff

APPENDIX N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

95 Seventh Street, P. O. Box 193939

San Francisco, CA 94119-3939

May 1, 1998

CA No. 96-17212 Michaud v. State Farm Ins.

97-15387 Michaud v. State Farm Ins.

To All Parties:

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See 9th Cir. R. 34-4. Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of a party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson

Clerk of Court

By: Mike Wheeler
Deputy Clerk

(3)

Supreme Court, U.S.
FILED
MAR 11 1999
OFFICE OF THE CLERK

NO. 98-1218

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Gerald Theodore, Michaud
Petitioner,

vs.

State Farm Mutual Automobile Insurance Company,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Gerald Theodore, Michaud
In Proper Person
P.O. Box 10236
Lahaina, Hawaii 96761
(808) 665-1077

30pp

QUESTIONS PRESENTED

I. WHETHER RESPONDENT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S ("State Farm") BRIEF IN OPPOSITION'S ("Brief") NEW POINTS RAISED SETTLED - THE FEDERAL COURTS LIMITED JURISDICTION BY ESTABLISHING BOTH SUBJECT MATTER AND PERSONAL JURISDICTION, MURRY V. I.R.S. 923 F.SUPP. 1289 AT 1290 (9)

II. WHETHER PETITIONER'S LAWFUL DISSENT INVALIDATES ANY CONSTITUTIONAL RIGHTS, INTER ALIA, VIZ, ACCESS TO SUBSTANTIAL DUE PROCESS AND JUSTICE

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

II. THE LOWER COURT'S DECISION MIGHT BE CONSIDERED VALID IF, AND ONLY IF, THE DECISIONS FOUND IN APPENDIX "A" ARE INVALID.

The new points presented by State Farm appear to suggest that Petitioner's remedy can be found in those who have elected to turn a blind eye and a deaf ear to Petitioner's lawful complaints, prejudicing Petitioner with unlawful departure from established rules of procedure while pretending such departure is a normal standard of practice. State Farm alleges that its new points raised allows the lower courts to overlook their duties, and allow replacement with arbitrariness over well established boundaries of law. See the September 9, 1996, Plaintiff Gerald T. Michaud's Memorandum in Response to Findings and Recommendation Filed Sept. 3, 1996, (Attachment "A"). The maxim of law, found in Black's Law Dictionary 5th Edition at page 762, declares, "A judge exceeding his office (or jurisdiction) is not to be obeyed."

CONCLUSION

This case presents serious due process issues affecting rules of court that touch a multitude of cases annually adverse to the Citizens of Hawaii. Petitioner respectfully requests this court grant Certiorari to review the issues and governing rules.

Dated: Lahaina, Hawaii, March 10, 1999

Gerald Theodore, Michaud - Petitioner

A1

APPENDIX A

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

SEP 0 9 1996

at 11 o'clock and ___ min. ___M.
WALTER A. Y. H. CHINN, CLERK

Gerald T. Michaud, Sui juris
C/O P.O. Box 10236
Lahaina, Hawaii 96761
Telephone: (808) 669-0887

Citizen In Party

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Gerald T. Michaud, Citizen In Party Plaintiff, vs. STATE FARM INSURANCE COMPANIES; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE;KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE B. CATCOTT; JOHN DOES C. 1-10; JANE DOES 1-10; CORPORATION DOES 1-10; PARTNERSHIP DOES 1-10; GOVERNMENTAL ENTITY DOES 1-10, inclusive, Defendants.	) CIVIL NO. 96 00155 SPK)))) PLAINTIFF Gerald T.) Michaud's MEMORANDUM) IN RESPONSE TO FINDINGS) AND RECOMENDATION) FILED SEPT. 3, 1996,) CERTIFICATE OF SERVICE))))))))JUDGE: SAMUEL P. KING)))INC. CASE NO.96-00155 SPK)

PLAINTIFF Gerald T. Michaud's
MEMORANDUM IN RESPONSE TO FINDINGS
AND RECOMMENDATION FILED SEPT. 3, 1996

I. INTRODUCTION

Plaintiff Gerald T. Michaud hereby submits this Memorandum in Response to the honorable United State's Magistrate Judge FRANCIS I. YAMASHITA'S findings and recommendation filed on September 3, 1996. Said Memorandum is for this court's consideration.

As set forth below, State Farm did not properly remove the instant action, and has failed to prove any such jurisdiction over Plaintiff from the very outset of the above entitled suit. State Farm's negligence per se, is revealed in its prima facie invalid Notice of Removal (hereinafter "Notice"). State Farm's acquiescence, and/or implied assent, would indicate that State Farm can not prove by a preponderance of evidence that the above entitled suit belongs in this Honorable Court. Upon review of the proper parties named on the Complaint, and Notice, said parties would indicate that a problem exists in diversity. The subsequent authorities will make it reasonably clear that State Farm did not serve the required information to reach a proper removal. State Farm's actions are vexatious, wanton, and oppressive.

II. FACTUAL BACKGROUND

On November 7, 1996 Plaintiff filed a Complaint in the Circuit Court of the Second Circuit, county of Maui, State of Hawaii. Said Complaint involves the laws and regulations which govern the no-fault

business of insurance, in, and for the State of Hawaii. Said laws challenge this Honorable Court's jurisdiction.

On February 15, 1996 State Farm et al, filed a prima facie invalid Notice. Please review the original Complaint, and/or Notice. Neither of which fulfill citizenship declarations as required by law, nor does either suggest that "original jurisdiction" belongs in the above entitled Court. There remains several non-diverse proper parties on the face of said suit. State Farm, on May 13, 1996, successfully mislead the Hawaii State Supreme Court into joining same into dismissing Plaintiff's appeal of action, by quoting the authority of LIBHART v. SANTA MONICA DAIRY CO., 592 F. 2d 1062 (9th Cir. 1979). See page 3 of Exhibit "E" of Defendant's Scheduling Conference Statement. What State Farm failed to mention to the Supreme Court, and to the above entitled Court for that matter, is that in the Libhart supra, paragraph [5] at pages 1063, and 1065, statement that: "...Removal is accomplished merely by a defendant filing a verified petition..." Please Note however that both State and Federal Court have overlooked the fact that State Farm wants a lawful verification, inter alia, in the above entitled action. (Emphasis throughout this Memorandum is Plaintiff's unless otherwise so stated).

Plaintiff found that the very first removal filings, in the united States, were recognized and termed, "Petition (s) for Removal." These petitions were revised (in title only) in 1988. The congressional intention was one of making the pleading on removal grounds simpler.

Plaintiff finds that this simplicity has also invited chicanery such as in this matter. Wright, Miller & Cooper, Federal Practice and Procedure, referring to David D. Siegel's Commentary on the 1988 Revision of Section 1446 of title 28 where Siegel stated that: "...no change of substance is intended and that the gist of what the new "notice" has to include is in any event no greater than what the old "petition" had to include," with the noted exception of a bond. Therefore, the points of contention with Plaintiff begin with, but are not limited to:

1. State Farm's Notice is invalid in that it does not conform properly to the rudimentary requirements found in either 29 Fed Proc, L Ed. page 554 § 69:61 below. 29 Fed Proc, L Ed § 69:61 Checklist of Removal Documents:

a. Cover page listing the documents attached;
b. Notice of filing removal petition and bond;
c. Verified petition for removal;
d. Copies of all process, pleadings, exhibits, appendices, orders, and summonses served in state action upon removing party;
e. A removal bond and power of attorney for person signing for the surety corporation;
f. Certificate of service of removal documents.

State Farm's Notice does not appear to harmonize with either 14 Federal Forms page 554 § 58:21, or with Vol. 2 West's Federal Forms § 1102. Plaintiff therefore contends that State Farm's Notice of Removal wants:

a. A cover page. This would conveniently describe the propriety of its contents;

b. A bond. This has now been replaced with the money sanction, which according to David D. Siegel's Commentary, is to be as potent a threat as the bond was, and possibly even greater.

c. A verification. See 29 Fed Proc, L Ed § 69:65 Verification. "What constitutes proper verification is a matter of federal law, state law requirements being inapplicable to removal petitions." See Title 28 § 1746 (1). A federally accepted sworn verification would have contained a statement such as; "I verify under penalty of perjury under the laws of the State of Hawaii that the following/above is true and correct..." State Farm's Notice contains a color of verification, but not a federally accepted one, and therefore attorney Douglas K. Ushijima's signed verification is invalid, and would thereby fail to meet the federal law requirements due to its notarization; "A court rule requiring that verification be notarized does not apply to verifications..." Bokum Resources Corp., D.C.N.M. 1982, 26 B.R. 615. Also See 29 Fed Proc, L Ed Supp §§ 69:60; "...If a petition conforming to the statutory requirements is filed a court must accept removal. On the other hand...by failing to file the "required" petition waive that right..." Whereas § 69:65 states; "Petitions for removal must be verified..." See Libhart, supra at 1063 [4], where it was said that; "Removal statutes are strictly construed against removal. 28 U.S.C.A. § 1446...Removal...is accomplished by defendant's filing verified petition..." It was also stated in the case of HERBERT v. ROXANA PETROLEUM CORPORATION, 12 F. 2d 81, that:

"Verification" is confirmation of correctness, truth, or authenticity of pleading...Under Judicial Code, § 29 (Comp. St. § 1011), requiring petitions for removal to be verified, petition verified before notary public of another state without proof of authority was not duly verified, and motion to remove was rightfully denied. Page 83...there was not submitted to said court a petition duly verified. In the absence of such proof of verification, the court "had no valid petition for removal" before it, and therefore rightfully denied the motion to remove..."

d. Copies of all pleadings. State Farm is missing, but not limited to: "Defendants Motion to Dismiss" filed January 17, 1996; "Plaintiffs' Response to Motion to Dismiss" filed January 30, 1996; "Defendants Reply Memorandum" filed February 12, 1996; "Plaintiffs' Motion for Stay" filed February 15, 1996; "Plaintiffs' Motion to Intervene" filed February 21, 1996; "Plaintiffs' Motion for Ruling" filed March 5, 1996; "Defendants' Memorandum in Opposition to Intervene, Stay, and Ruling" filed March 18, 1996. See 28 USCS § 1446 (a) for notice to contain all process, and pleadings, etc.. See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3733. Without such pleading, the above entitled Court could not possibly realign parties properly. See AYNESWORTH v. BEECH AIRCRAFT CORP., 604 F. Supp. 630 (1985), at 633, A. Realignment. The Aynesworth decision was; "Before determining removability...on the basis of diversity of citizenship, the Court will realign the parties according to their true interest, as it would were the case brought into federal court originally. Heniford v. American Motors Sales, Corp., supra at 328."

2. Plaintiff contends that State Farm's Removal is invalid in that it was negligent to a portion of the "checklist of contents for a petition" found in 29 Fed Proc, L Ed § 69:68:

- Statement specifying the statute(s) which confer jurisdiction upon District Court
- State of facts supporting jurisdiction
- Date of receipt of initial pleading...
- Statement that removal is timely under ...1446(b)
- Statement that petition is accompanied by a bond conditioned as required by law
- Statement that ...defendants...joined in removal petition
- Specific allegations of fraudulent joinder or fraudulent amount...

a. Plaintiff contends that State Farm's Notice of Removal, inter alia, is invalid, and fails for want of a statement that removal is timely under 28 USCS § 1446(b). See POULOS v. NAAS FOODS, INC., 959 F.2d 69 at 71 (1992), where the court held; "There are two ways for a diversity suit to wind up in federal court. A plaintiff may bring an action to federal court directly, or a defendant may remove a case to federal court from state court within 30 days of its inception." Also see EASLEY v. PETTIBONE MICHIGAN CORP., 990 F.2d 905 (1993), stating that; "...only if the petition for removal was filed within 30 days of service of the complaint and if there was diversity of citizenship at the critical time. Under section 1441 (b), diversity of citizenship must exist as to a party both at the time the state action is commenced and at the time the defendant files the petition for removal. Kinney v. Columbia Savings & Loan Association,

191 U.S. 78, 81, 24 S.Ct. 30, 31, 48 L. Ed. 103 (1903); Kanzelberger v. Kanzelberger, 782 F.2d 774, 776 (1986) (citing 14A Wright, Miller & Cooper, Federal Practice and Procedure § 3723, at pp. 312-14 (2d ed. 1985)." Also see Aynesworth supra at 631 [1], and 633 [1, 2], where it was said: "...diversity must exist both at the time the original action is filed in state court and at the time removal is sought..." Neither condition existed in the above entitled matter. Whereas the CONTINENTAL OIL COMPANY v. PPG INDUSTRIES, INC., 355 F. Supp. 1183 (1973), at 1185 said; "If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service...of a...motion...from which it may first be ascertained that the case is one which is or has become removable." State Farm did not perform either prerequisite, except perhaps under some color of law, nor has the state or federal court applied either of these questions of law to the instant matter.

b. State Farm's Notice of Removal is invalid, and fails for want of a statement that the defendants joined in the Removal Notice. Affidavits are required from the remaining proper party Defendants stating that they joined in the notice for removal. See 29 Fed Proc, L Ed § 69:69; where it is said that, "...Where any of the defendants fails either to join in the petition...the petition which has been filed will be insufficient on its face to perfect removal..." Also see, GETTY OIL CORP., DIV. OF TEXACO, INC. v. INSURANCE CO. OF NORTH AMERICA, 841 F.2d (1988), and

MECHANICAL RUBBER & SUPPLY CO. v. AMERICAN SAW & MFG. CO., 810 F. Supp. 986 (1990) for cases involving multiple defendants who are given a 30 day period for joining petition for removal such as in this instant matter.

c. State Farm's Removal is invalid in that it misrepresents the term "fraudulently joined defendants." At paragraph 10 of State Farm's Removal it declares that; " the Removal concerns "a diversity of citizenship" due to Plaintiff's fraudulently joined defendants." See 29 Fed Proc, L Ed. § 58:106, and Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3741 for a discussion of the effect of post-removal joinder of a non-diverse party under 28 USCS § 1447(e). Concerning pre-joined defendants See 29 Fed Proc, L Ed. § 58:9 at; "If claims against a non-diverse defendant are dismissed involuntarily-that is without the plaintiff's consent-removal on the basis of diversity is improper." Also see Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3723. State Farm has not proven the fact that Plaintiff fraudulently joined the proper party Defendants in order to avoid this Honorable Court's jurisdiction. Please see LANE v. CHAMPION INTERNATIONAL CORP., 827 F. Supp. 701 (1993), where the court held that joinder of a defendant is not fraudulent simply because the motive is to defeat diversity, if the plaintiffs' allegations set forth a good-faith claim under state law, no matter how doubtful. This point to be elaborated on later in the discussion section of this memorandum by quoting authorities

such as COUGHLIN V. NATIONWIDE MUT. INS. CO., 776 F.Supp. 626 (1991).

3. State Farm's Removal is invalid prima facie for it is ambiguous in that it does not conform to either; (a) 14 Federal Forms page 554, § 58:21, or (b) § 1102 of Vol. 2 West's Federal Forms--3. There is a presumption in State Farm's Notice. In its opening statement there is a persuasion that would lead one into believing that the removal is based entirely on a federal question of law rather than a diversity of citizenship. It merely asserts that it was made pursuant to Title 28 §§ 1441 & 1446, with no mention of § 1332 until paragraph 10. See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3723.

4. State Farm's Removal is invalid although it is properly titled (under color of office), "Notice of Removal." The 1988 revision of Section 1446 would forewarn most into concluding that a correct declaration would be found somewhere within its contents (preferably in its title) a statement that would establish the fact that the "Notice of Removal" is Signed under Rule 11, and is made in Substitution for a "Verified Petition," or to at least state that the "Notice of Removal is signed pursuant to Rule 11." State Farm's alleged Notice of Removal does not state that it was signed pursuant to the Federal Rules of Civil Procedure, Rule 11 requirement. See Title 28 § 1446 (a). This Rule 11 prerequisite was obviously overlooked by both state, and federal Court's. See Plaintiff's March 8, 1996 Response to Defendants' Notice of Removal at paragraph 7,

and also see Aynesworth supra at 637 [10], "...removal in compliance with F.R.C.P. 11..."

5. State Farm's Removal is invalid in that it did not describe its diverse citizenship status properly. State Farm would be considered by law to be a national citizen, as is Plaintiff, both of which belong to the same political community. "For purposes of removal on diversity grounds, corporations are citizens both of the states of their incorporation and the states of their principal places of business. Thus, a multistate corporation incorporated in the forum may not remove a suit brought against it in a state court to a federal court on diversity grounds." See 29 Fed Proc, L Ed. § 69:26 Corporations. Also see Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3724.

6. State Farm's Removal is invalid in that it fails to meet the diversity question found at 29 Fed Proc, L Ed § 69:64. "...it is necessary to allege that diversity of citizenship existed both at the time of the lawsuit's commencement and the time of the removal petition." See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3723.

7. State Farm's Removal is invalid in that it fails to meet the plain statement of jurisdiction. See 29 Fed Proc, L Ed § 69:62; "removal is not necessarily exempt from the requirement of a short and plain statement of jurisdiction..." See the Appendix of forms in the Rules of Civil Procedure pg. 499-500, Form 2. Allegation of Jurisdiction, amended Dec. 1, 1993.

8. State Farm's Removal is invalid in that it acquiesced to Plaintiff's following questions which would resolve most jurisdictional questions, and/or issues that would involve the above entitled Court. State Farm has made no visible attempt to severally address any of the pointed questions stated in Plaintiff's Response to Order to Show Cause, nor the Demand for Proof of Jurisdiction, which Plaintiff fairly demanded:

a. Reasonable identification of the proper person (s) executing the removal;

b. The instrument or agreement that Plaintiff voluntarily removed Defendants as proper parties from Complaint in order to accomplish removal;

c. The law that would allow State Farm, ex parte, the power to remove a case from state court to federal district court;

d. The verification that the removal was signed pursuant to F.R.C.P 11;

e. The Implementing Regulations for Title 28 §§ 1332, 1441 & 1446 as required by UNITED STATES v. MERSKY et al., 361 US 431 at 438, and is sanctioned by the decision found in US v. MASON, 412 US 391 (1973), and

f. A response to the questions at law found on pages 4 through 6 of Plaintiff's Memorandum to Order to Show Cause.

9. State Farm's Removal is invalid in that it fails to admit that the controversy is a joint altercation between Plaintiff and the above entitled proper parties.

10. State Farm's Removal is invalid in that it fails to admit that the issues only pertain to matters of the State. Said matters are those which govern the legal process of conducting proper cancellation procedures in the business of insurance, as well as bad faith actions concerning Hawaii no-fault policies of insurance.

11. State Farm's Removal is invalid in the fact that by law the United States District Courts are courts of limited Jurisdiction involving diversity suits.

III. DISCUSSION

A. Complete Diversity of Citizenship Does Not and Did Not Exist From The Outset

1. STRAWBRIDGE et al. v. CURTISS et al, Book 7, 3 Cranch

Jurisdiction in regards to citizens of different states was first submitted for consideration in this Honorable Court for which Marshall, Ch. J., delivered the opinion of the court. The decision:

> "That the jurisdiction cannot be supported." Because, "The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

Marshall also stated in the New Orleans v. Winter, 1 Wheat 91, that: "In the case of Strawbridge v. Curtiss, it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction." It was also said that: "The action is brought jointly, not each claiming his several part; and the court cannot disconnect the parties..." In the LOUISVILLE, &c., RAILROAD. v. IDE, 114 U.S. 55, at pg. 56, it was said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Smith v. Rines, 2 Sumner, 348. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way (no Admirality or Maritime jurisdiction allowed). The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here it is certain joint contracts entered into by all the defendants...On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible..." Plaintiff's insurance policy is also a joint agreement between Plaintiff, State Farm, and

the Hawaii State Insurance Commission. The aforesaid policy would indicate a joint contract. Said contract pertains to a three party specific performance agreement. Said performances are to be accomplished by both Plaintiff, and the proper party Defendants, who are each governed by certain Rules established by the Hawaii State Insurance Commission.

B. Citizenship Is Not Established In Either The Complaint Or Notice Of Removal

1. Title 28 U.S.C.A. § 1441 Does Apply

Citizenship was neither established in the Complaint nor in the Notice of Removal, therefore State Farm does not fulfill the proper citizenship requirement. See ATLANTA SHIPPING CORP. v. INTERNATIONAL MODULAR HOUSING INC., 547 F.Supp. 1356, stating that: "...diversity must exist both at time of filing in state court and at time of removal." The Complaint alleges that the Plaintiff is a resident of Hawaii, and that State Farm is an Illinois corporation authorized to, and doing business in the State of Hawaii, and the Notice of Removal alleges that State Farm is a company organized and existing under the laws of the State of Illinois. In quoting the case of, KERSTETTER v. OHIO CAS. INS. CO., 496 F. Supp. 1305, at 1305 [2], and 1307 [2] (1980) in reference to 28 U.S.C.A. § 1441, it was said:

> "When defendant seeks to remove an action to federal court on the basis that the parties are of diverse citizenship, diversity of citizenship must be shown to have existed at the time of commencement of action in state court and at

> the time of filing of petition for removal. Unanue v. Caribbean Canneries, inc., 323 F. Supp. 63 (1971); Garza v. Midland National Insurance Co., 256 F. Supp. 12 (1966); Carlton Properties, Inc. v. Crescent City Leasing Corp., 212 F. Supp. 370 (1962); 1A Moore's Federal Practice 0.161[1], at 207 (2d 1979). In this action, neither of these criteria has been satisfied" (This is also true with State Farm).

It was also said in the Kerstetter case, supra at 1307 [3], that; "...neither the complaint nor the petition for removal properly pleads diversity in this action..." In the case of KELLAM v. KEITH, 144 U.S. 568, speaking on the authority of Stevens v. Nichols, 130 U.S. 230 et al, where the controversy is wholly between citizens of different States, and where the petition and bond were provided, the action was remanded because the complaint did not disclose the citizenship of the parties. Such as in this instant matter. The Stevens case, ibid., stated that "if it does not appear in the record that such diversity also existed at the commencement of the action, the cause will be remanded." See CODITRON CORP. v. AFA PROTECTIVE SYSTEMS, INC., 392 F. Supp. 158, at 159 [10] (1975) referring to 28 U.S.C.A. § 1447(c), where it was said that; "Removability is to be determined from the face of the complaint at the time of removal." In the decision found in CUDNEY v. MIDCONTINENT AIRLINES INC., 98 F. Supp. 403, it was declared that; "...removal refused when the resident defendant had been dropped by the court on the merits..." Plaintiff's Complaint does not disclose citizenship of either party, nor were these conditions properly resolved by state or federal court."

C. Diversity of Citizenship Is Not Based On Residence or Principal Place of Business

State Farm has asserted in its Notice of Removal that its principal place of business is in Bloomington, Illinois, and that Plaintiff is a citizen of the State of Hawaii. State Farm's averment in its Notice of Removal is contrary to the Record, and what the Complaint actually reads is in regards to residence of Plaintiff. The Complaint discloses Plaintiff's alleged residence only, not citizenship. The Kerstetter case supra at pages 1306-1307 par. 3 & 5, addresses both of these issues in that it is of the opinion that; "For purposes of establishing diversity jurisdiction, allegations of residence are not synonymous with citizenship." Raymond J. Broderick held that: "defendant's removal petition did not establish diversity of citizenship, since allegations in petition of plaintiff's residence were not sufficient to establish plaintiff's citizenship. These allegations of residence are not sufficient because, for the purpose of establishing diversity, residence is not synonymous with citizenship." Whitelock v. Leatherman, 460 F. 2d 507 (1972); Luehrs v. Utah Home Fire Insurance Co., 450 F. 2d 452 (9th Cir. 1971); Freedman v. Zurich Insurance Co., 264 F. Supp. 550 (1967). Concerning the Kerstetter supra, court's decision over a principal place of business, they say that a defendant has not carried its burden of proving that removal is proper if the principal place of business of the defendant is not alleged in the complaint. What Kerstetter supra said at [4]; "an allegation of a corporation's principal place of business is necessary,

and a principal office is not synonymous with a principal place of business. Uniroyal, Inc. v. Heller, 65 F.R.D. 83 (1974); Gavin v. Read Corp., 356 F. Supp. 483 (1973); Carlton, supra; Washington East Washington Joint Authority v. Roberts and Schaefer Co., 180 F. Supp. 15 (1960). The principal place of business of the defendant is not alleged in the complaint. Moreover, the allegations in the petition for removal are in the present tense and do not properly allege the existence of diversity at the time the complaint was filed in state court. Garza v. Midland National Insurance Co., 256 F. Supp. 12 (1966); Matteson v. Bressette, 250 F. Supp. 646 (1966)."

Plaintiff contends that State Farm did not testify properly in its Notice, that the location from which it engages in the sales, and the writing of contracts in the State of Hawaii, is strictly performed out of Bloomington, Illinois, and that their principal place of business for the aforementioned writings in the State of Hawaii is especially located and performed in Bloomington, Illinois.

In order to remain within the congressional intent of title 28 § 1332, we the people of the united States, comprising the 50 united States of America, are a federation of individuals and states which are commonly joined by compact, and/or union. We collectively have no diversity in citizenship. See CABALCETA v. STANDARD FRUIT CO., 883 F.2d 1553 at 1557 (1989), quoting Strawbridge, supra, 2 L.Ed. 435 (1806); "This rule requires that all plaintiffs and all defendants must be of different

citizenship's." In agreement with the aforesaid decisions is Poulos supra at 71 who also quotes Strawbridge, supra; "(now 28 U.S.C. § 1332) applied only to cases in which no party shared common citizenship with any party on the other side of the dispute." State Farm and Plaintiff are of a common citizenship as are the proper party Defendants.

D. Improperly Joined, Or Fraudulently Joined Defendants Not Substantiated

State Farm claims that an issue arose in the fact that Plaintiff improperly joined, or fraudulently joined certain defendants in suit. State Farm also claimed in its "Statement Contesting Jurisdiction" filed in the Hawaii State Supreme Court on May 13, 1996, and stated at page 4 of same that; "the order appealed from is not a final appealable order; no final judgment was entered...The Order, thus, did not dismiss all claims against all parties, nor did it enter judgment in favor of or against any party...Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 117-18, 869 P. 2d 1334, 1336-37 (1994)..." Plaintiff contends that in the case of Stone v. Foster, 163 F. Supp. 298 (1958), it was determined that "...defendant whose presence destroys removal must be taken completely out of the case." Although Continental Oil Co., supra at 1183 said; "Dismissal of a defendant can change a case which has been filed in state court and which is otherwise nonremovable to federal court to a removable one only if dismissal of the defendant was a voluntary dismissal rather than an involuntary dismissal that might be overturned on appeal to a higher

state court...Denial by state Supreme Court of plaintiff's application...against severance from state court action of one defendant was not tantamount to an adjudication of motion for severance; thus, severance of that defendant was analogous to an involuntary dismissal and did not change case, which was otherwise not removable, into one which could be removed to federal court based upon diversity jurisdiction...state law might impose liability on the additional defendants on the facts involved." See the Weems doctrine at WEEMS v. LOUIS DREYFUS CORP., 380 F.2d 545 (1967), respecting the voluntary-involuntary rule. State Farm in its "Statement Contesting Jurisdiction" would appear to agree with this rule whole-heartedly.

Accordingly, the proper parties known as State Farm Defendants ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH, and MONIQUE CATCOTT are still Defendants in this instant suit for they have not been taken completely out of the case, and will not be taken out until such time as to when they can prove to a JURY that their procedural actions were done in good faith. State Farm contradicts all that it has previously plead, and now fearlessly aver to the above entitled court that these same certain aforementioned Defendants were completely dismissed from the original complaint, yet they remain on their Notice of Removal. State Farm wants any form of consistency. The record indicates (which this Court is in need of) that the dismissal of the above mentioned Defendants

took place out of law, by/through the action of the State Court who arbitrarily disregarded the Rules of court, which require defendants to submit affidavits in order to establish their severability from the case. This Honorable Court was not provided a copy of the Motion to Dismiss the above entitled Defendants, and therefore must look elsewhere for a decision in guidance concerning this instant matter. Please see BOLLING v. UNION NAT. LIFE INS. CO., 900 F. Supp. 400 (1995) where it said that:

> "Where party alleges fraudulent joinder, that party bears burden of proving its allegations and must do so by clear and convincing evidence; although court properly looks to complaint itself to determine whether there has been fraudulent joinder, court may resort to additional submissions such as deposition testimony and affidavits in making determination; all allegations and submissions must be viewed in light most favorable to plaintiff. 28 U.S.C.A. § 1332.

In this instant matter State Farm did not submit all of the pleading. The Second Circuit Court did not look to the complaint, and disregarded the Rule governing affidavits altogether. Not to mention the fact that the Complaint named Governmental Entity Does, which would indicate an implied defendant(s) representing the State of Hawaii Insurance Commission. It was also said in the Bolling case, supra, at page 400 that; "Federal courts are courts of limited jurisdiction..." and, at page 406 [8], that: "There are two tests that a court uses to determine whether a party has been fraudulently joined..." See Cabalceta v. Standard Fruit Co., supra, at 12 page 1554, and [1. 2] page 1555. Whereas the LAUGHLIN v. PRUDENTIAL INS. CO., 882 F. 2d 187 (1989) cite would clarify the

joinder issue within this instant matter in that; "both principal and agent may be held accountable..." and "...is controlled by allegations of plaintiff's complaint. 28 U.S.C.A. § 1441 (c)...An agent receives no shield from the fact that she is an agent or because her principal is also liable for the tort. An agent who uses the legal process in an illegal manner incurs the same liability as she would have incurred had she employed it in her own behalf, 1 Am. Jur. 2d, Abuse of Process, Section 19, see Allen v. Ritter, 235 So. 2d 253 (1970); State Use of Richardson v. Edgeworth, 214 So. 2d 579 (1968), and both principal and agent may be held accountable...The removing party must show...that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts...the removing party has burden of proving the fraud...this court must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff. B., Inc. v. Miller Brewing Co., 663 F. 2d 545 (1981), Bobby Jones Garden Apartments v. Suleski, 391 F. 2d 172 (1968). In addition, any uncertainties in controlling substantive law must be resolved in favor of the plaintiff. Id." This Court wants the aforesaid Motion pleading which would enable it to determine Defendants standing. Plaintiff's Complaint raises the issues of unlawful process, and bad faith in regards to the proper party Defendants. The Laughlin case, supra, [7] at 191 covers the fact that individuals engaged in the business of insurance process are only protected in good faith conduct, and provides no such immunity against liability for abuse of process, and "where there is a single

wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441 (c)." American Fire & Casualty v. Finn, 341 U.S. 6, 14, 71 S. Ct. 534, 540, 95 L. Ed. 702, 708 (1951); Moore v. United Service Auto. Ass'n, 819 F. 2d 101 (1987)." The COUGHLIN V. NATIONWIDE MUT. INS. CO., 776 F.Supp. 626 (1991), at 628 [4. 5] said; "In determining whether the plaintiffs fraudulently joined the resident defendant, the Court must examine the complaint as it existed when the petition for removal was filed. Ching v. Mitre Corp., 921 F. 2d 11, 13 (1990)." Plaintiff's Complaint in this instant matter is centered around abuse of process in reference to Hawaii State Regulations pertaining to cancellation procedures, and as in the Laughlin example, supra, fraudulent joinder had not been established, and the case was improvidently removed because the district court lacked jurisdiction as in this instant matter.

E. The United States District Court Is Of Limited, And Not Broad Jurisdiction

It was said in the Bolling case supra, at page 400, "federal courts are courts of limited jurisdiction." Also See Libhart case supra, at 1064, in that federal law determines removal jurisdiction which is strictly construed against removal, quoting Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 12114 (1941); 14 Wright, Miller and Cooper, Federal Practice and Procedure, 3721, pp. 533-37. The

decision claiming; "...An example of our strict construction of our jurisdictional statutes is the complete diversity rule of Strawbridge v. Curtiss..." This rule is also found in the Poulos case supra, at page 71.

F. State Farm is not a citizen who can claim diversity status

Because State Farm is recognized in most, if not in all 50 states of the union, it is held that; "A two-pronged test is employed analyzing statutory authorization and actual scope of activities. If both extend beyond one state, the corporation is a national citizen, ineligible for diversity." LITTLE LEAGUE BASEBALL v. WELSH PUB. GROUP INC., 874 F. Supp. 648 (1995).

It being a settled fact that Under the Fourteenth Amendment of the United States Constitution, State Farm has consequently become a national citizen, and therefore is not subject to diversity-based removal.

G. State Farm Has Not Overcome The Jurisdictional Issue

1. McNUTT v. GENERAL MOTORS ACCEPTANCE CORP., 298 U.S. 178, "...the court may insist that the jurisdictional facts be established by a preponderance of evidence or the case be dismissed. Pp. 182, and 189. P. 182. ..It is incumbent...to allege the jurisdictional facts, according to the nature of the case. Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." Wilson v. Daniel, 3 Dall. 401, 407, 408;

Barry v. Edmunds, 116 U.S. 550, 560; Vance v. Vandercook Co. (No. 2), 170 U.S. 468, 481; P. 183 ...where the jurisdictional issue was thus raised, the burden of proof was upon the defendant. P. 189 ...The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations...The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute

which clothes them with adequate authority and imposes upon them a correlative duty."

2. CODITRON CORP. v. AFA PROTECTIVE SYSTEMS, INC., 392 F. Supp. 158 (1975). "As a general rule, if plaintiff has a remedy under both state and federal law, it may base its claim solely on state law and thus defeat defendant's potential right to removal, if diversity of citizenship is lacking...Removability is to be determined from the face of the complaint at the time of removal. 28 U.S.C.A. § 1447 (c)"

H. The United States District Court Has Discretionary Power

Plaintiff contends that this Honorable Court possess the power to exercise the doctrine of "Forum Non Conveniens," referring to the discretionary power of a court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum. See Cabalceta case supra, at 1555, and 1556. Plaintiff has objected to State Farm's fraudulent removal from the outset. See, On Remand: 29 Fed Proc, L Ed Supp § 69:112. "Required when case removed improvidently ("rendered without adequate consideration by the court, or without proper information as to all the circumstances affecting it, or based upon a mistaken assumption or misleading information or advice." Black's Law Dict.) and without jurisdiction. 28 USCS §1447 (c) directs the Federal District Court to remand that case to the state court...The plaintiff's objection to a petition for removal is properly treated as a motion to remand. Pangrazzi v. United States 551 F Supp 648 (1981) Plaintiff has

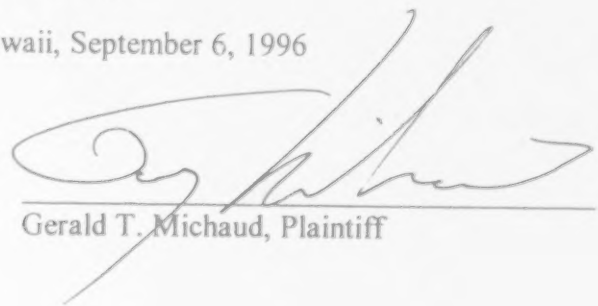
objected from the out set, therefore once more for the record, Plaintiff again objects to State Farm's fraudulent removal with this honorable court's sanctioned approval.

IV. CONCLUSION

In light of the preponderance of evidence submitted by Plaintiff in connection with: 1. Improper form of Defendant's Notice; 2. No proper cover page; 3. Incomplete pleadings; 4. No verification; 5. No statement that removal is timely; 6. No signature pursuant to F.R.C.P. 11; 7. No factual evidence that Defendants were fraudulently joined; 8. No diversity of citizenship between State Farm and Plaintiff; 9. No diversity existing at the time of the lawsuits commencement; 10. No proper jurisdictional statement; 11. No identification of person(s) executing Removal; 12. No visual agreement that Plaintiff voluntarily removed Defendants from the Complaint; 13. No reference made to the Implementing Regulations for title 28 §§ 1332, 1441, and 1446; 14. No jurisdiction due to District Courts limitations; 15. No severalbility in this instant case for controversy is joint; 16. No realignment of proper parties; 17. No established citizenship in Complaint or Notice of Removal ; 18. No response to Plaintiff's response concerning 28 U.S.C. § 1332(d); 19. No properly established residence's, or principal place of business; 20. No immunity to agents; 21. No justification for improvidently removed cases, and 22. No power over State Law jurisdiction.

Plaintiff therefore respectfully submits that federal jurisdiction has never existed in the above entitled case, except for the now raised federal question concerning Defendant's obstruction of Plaintiff's VII Amendment United States Constitutional Right.

DATED: Lahaina, Hawaii, September 6, 1996



Gerald T. Michaud, Plaintiff